Islamic Legal Philosophy

A STUDY OF ABŪ ISḤĀQ AL-SHĀṬIBĪ'S
LIFE AND THOUGHT

Muhammad Khalid Masud

FOREWORD

Protection of the rights of those who cannot protect themselves is the main function of law. In addition, the Sharī'a, the social code of Islam, aims at creating a society based on a deep sense of moral responsibility in which every citizen can develop his personality in accordance with his spiritual and moral traditions. The fundamental difference between the Sharī'a and secular law is that the first is based on revelation. That is why Islamic law does not accept the idea that whatever human society determines on the basis of what is useful for it, is good. It is quite possible that the 'good' of human society may turn out to be an evil in Islamic law. For example, usury is allowed by modern law while the Sharī'a considers it an evil; or the fact that sexual relations based on free will are allowed by secular law while they are held to be a sin in the Sharī'a.

Despite the fact that Muslims of the Subcontinent recognise the supremacy of the Sharī'a and have always longed to see it put into practice, they have not been able to do so for one reason or another. In fact, they, like most other peoples of the East, were defeated by a materialistic philosophy. Consequently corruption penetrated their social circles so deeply that Sharī'a was more or less banished from their society. They sank into social and spiritual crises again and again. But this led them to regain their complete faith in the Sharī'a because love and deep respect

for the Sharī'a remained embedded in their sub-conscious. They committed themselves in the 1973 Constitution of Pakistan to mould their lives according to Muslim Law. But the task is not easy. They have to study the classical litrature produced by Muslim thinkers and Fuqaha on the subject of Islamic law.

Abū Isḥāq al-Shāṭibī (d. 1388) is one of those distinguished Scholars who has written in detail on the subject. We are very glad to be able to produce a book on his legal philosophy. It is hoped that the Islamic Research Institute in the very near future will undertake studies of other Muslim scholars such as Ibn Tamiyya and Ibn Qayyim with a view to paving the way for a truly human society based on divine law and spiritual values.

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"*God made this blessed righteous Sharī'a accommodating and convenient and thus won the hearts of men and invoked in them love and respect for law. Had they had to act against convenience they could not have honestly fulfilled their obligations.*"

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ABŪ ISḤĀQ AL-SHĀṬIBĪ
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Abū Isḥāq al-Shāṭibī's (d. 790/1388) concept of *maṣlaḥa* forms the basis of his philosophy of Islamic law. Despite frequent references to Shāṭibī's doctrines and their relevance to the problems of modern Islamic legal theories, no exclusive study of Shāṭibī's legal philosophy appears to have been made. The present study is the first attempt in this regard.

This study constitutes an endeavour to understand the relationship of legal theory with social change in Islamic legal thought. It is argued here that Shāṭibī had developed the concept of *maṣlaḥa* as the fundamental characteristic of Islamic legal theory which makes it adaptable to social needs. Certain the ological and philosophical doctrines in Islamic thought had limited the validity of this concept. Shāṭibī's penetrating analysis of such doctrines and his definition of this concept as the goal and objective of Islamic law frees it from such doctrinal limitations and brings it into fore as a dynamic principle of Islamic legal theory.

This book is an amended and some what reorganized version of a doctoral thesis presented to the Faculty of Graduate studies at McGill University, Montreal, Canada, in 1973 under the title: "Shāṭibī's Philosophy of Islamic Law — An analytical study of Shāṭibī's concept of *maṣlaḥa* in relation to his doctrine of *maqāṣid al-Sharī'a* with particular reference to the problem of adaptability of Islamic legal theory to social change."

The study is divided into three parts. First part (Chs. I-III) deals with Shāṭibī's life and works and with the milieu in which his legal thought developed. Part two (Chs. IV & V) surveys the development of the concept of *maṣlaḥa* in Islamic jurisprudence before Shāṭibī as well as in modern times. Part three (Chs. VI-XIV) analyses Shāṭibī's philosophy of Islamic Law. An introductory chapter formulates the framework for the study of the question of adaptability/immutability of Islamic law against which Shāṭibī's thought is analysed in chapters VI-XIV.

Chapter Six discusses *al-Muwāfaqāt*, the main source of this study, and surveys recent studies on the book. The next eight chapters (Chs.

v

XII-XIV) analyse in detail Shāṭibī's following concepts: *Sharī'a, maqāṣid al-Sharī'a, maṣlaḥa, ma'nā, taklīf, mashaqqa, ta'abbud, niyya, 'āda, bid'a* and *ijtihād*. Chapter fourteen reconstructs Shāṭibī's view on continuity and change in Islamic law.

The mains sources of Shāṭibī's thought in this study are his works *al-Muwāfaqāt* and *al-I'tiṣām* which have been discussed in chapters two and six. As to the sources of information about the history of the period and on Shāṭibī's life they have been reviewed in the beginning of the relevant chapters or in the notes.

Regarding transliteration, a table is attached. The Arabic affix *al-* with proper names is usually omitted. In transliterating Arabic titles of the books only first letter is capitalized. It has not been possible to follow strictly the method of supplying diacritical marks to the words of European langauages.

Studies of *Uṣūl al-fiqh* in English are still at a level where exact translations of Arabic terms are not possible. Hence English equivalents of Arabic terms have been used in this volume only when they are usually so accepted; in case of doubt, the Arabic term is supplied in parenthesis. An explanatory English translation is given in parenthesis when the Arabic is used first. At later point Arabic term itself is normally used without repeating the translation. For ready reference a Glossary of terms is given at the end of the book.

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Acknowledgements

TRANSLITERATION TABLE

CONSONANTS

Arabic	Latin
ء	'
ب	b
ت	t
ث	th
ج	j
ح	ḥ
خ	kh
د	d
ذ	dh
ر	r
ز	z
س	s
ش	sh
ص	ṣ
ض	ḍ
ط	ṭ
ظ	ẓ
ع	'
غ	gh
ف	f
ق	q
ك	k
ل	l
م	m
ن	n
و	w
ه	h
ى	y
ال	al- and 'l-. (Omitted in front of proper names.)
ة	-a (-at in construct state)

VOWELS

Long: ى ، آ ، ا : ā ; او :
ū ; اى : ī

Short: ﹷ : a ; ﹹ : u ;
ﹻ : i

Doubled :

ﹻ : iyy (final form ﹻى : ī)

ﹹ : uww (final form ﹹو : ū)

Dipthongs :

اَو : aw ; اَى : ay

CONTENTS

INTRODUCTION

The relationship between legal theory and social change is one of the basic problems of the philosophies of law.[1] "Law" which, having its associations with physical laws, is assumed to be unchanging, always faces the challenge of social changes which demand adaptability from it. Most often the impact of social change is so profound that it affects legal concepts as well as institutions and thus creates a need for a fresh philosophy of law. The problem of social change and legal theory is of particular significance in Islamic legal philosophy. Islamic law is generally defined as religious, sacred and hence immutable. How does such a law face the challenge of change?

The above question has brought to the fore the problem of the adaptability of Islamic law which has been so widely discussed, yet remains debatable. The problem has been generally formulated in the form of the following question: Is Islamic law immutable or is it adaptable to the extent that the change and modernization sought can be pursued under its aegis?

Broadly speaking, there have been two points of view in answer to this question. One view, which is shared by a large number of Islamicists such as C.S. Hurgronje and J.Schacht, and by the most of the traditionalist Muslim jurists, maintains that in its concept, and according to the nature of its development and methodology, Islamic law is immutable and hence not adaptable to social changes. A second view, which is upheld by a few experts on Islamic law such as Linant de Bellefonds and by the majority of Muslim reformists and jurists such as Ṣubḥī Maḥmaṣānī, contends that

such legal principles as the consideration of *maṣlaḥa* (roughly translated, human good), the flexibility of Islamic law in practice and the emphasis on *ijtihād* (independent legal reasoning) sufficiently demonstrate that Islamic law is adaptable to social change.

Before any general conclusions be drawn regarding the adaptability of Islamic law, the problem requires a great deal of spade work. For a clear analysis to be achieved, the primary task is to study the various aspects and levels of this problem which should be distinguished sharply from one another and yet be studied in conjunction with one another. Furthermore, since Islamic theory has developed through the writings of various jurists having different historical backgrounds, the problem of adaptability requires to be studied in specific reference to individual jurists in their historical settings.

An analysis of the concept of Islamic law, on the other hand, requires a detailed study of the essential ideas in Islamic legal theory especially those pertinent to the question of adaptability. *Maṣlaḥa* is one such idea. This concept is of fundamental significance to the proponents of the adaptability view. They argue that Islamic law aims at the *maṣāliḥ* (plural of *maṣlaḥa*) of man, hence logically, it should welcome any social change that serves this purpose. Furthermore, with such an objective in view Islamic law cannot be rigid and inert in regard to social change.

Among the very few jurists who treated the concept of *maṣlaḥa* as an independent principle of legal theory, Abū Isḥāq Ibrāhīm b. Mūsā al-Shāṭibī (d. 790/1388) made one of the more significant contributions. In his *al-Muwāfaqāt,* Shāṭibī presented a doctrine of *maqāṣid al-sharī'a* (the purpose or ends of law) which comprises an exposition of the various aspects of the concept of *maṣlaḥa* as a principle of legal theory. Shāṭibī is therefore a valid choice for a study the requirements of which we have discussed above.

The choice of Shāṭibī is further prompted by the fact that in their support of the adaptability-view, it is largely Shāṭibī upon whose arguments the modern reformists have relied in facing the challenge of social change to Islamic legal theory.

Shāṭibī sought an answer to such a challenge in the principle of *maṣlaḥa*. A discussion of Shāṭibī's answer is, however, unwarranted unless we first explain what the 'immutability' of Islamic law means.

Presuming that the interaction between social change and legal theory must have been at work in Islamic law before Shāṭibī as well, it may be rightfully suggested that to define the key terms of this study in order to evaluate Shāṭibī's contribution to the philosophy of Islamic law his views must be studied in comparison with those of his predecessors. Unfortunately, fulfilment of this task is not possible in view of the present state of scholarship on the philosophy of Islamic law; not only because a general history of Islamic legal philosophy does not exist, but also because very few studies have been made on individual *uṣūl* works.

On the other hand, an attempt to establish the views of Shāṭibī's predecessors by surveying the original sources is also beyond the scope of this study. The literature available on *uṣūl al-fiqh,* belonging to the pre-Shāṭibī period is enormous and there is no way to estimate how much more material was lost or not yet discovered. There is, in addition, the problem of the differences in the legal doctrines among various schools of law due to the various theological and philosophical predilections of the *uṣūl* writers. Such extra-legal considerations are reflected in the treatment of legal theory. A survey of the philosophy of law, therefore, would demand an investigation of all these aspects which is impossible within the limited scope of this volume.

It is with these limitations in view that in attempting to formulate an understanding of the key terms of the problem of the adaptability of Islamic legal theory to social change, this chapter proposes to make an analysis of the findings of recent scholarship on this problem. This choice is made mainly in consideration of the fact that in the modern period (since the beginning of the nineteenth century) the question of the adaptability of legal theory to social change has been asked more pointedly than ever before. Hence, the formulation of the problem can be expected to be clearer than in earlier periods of the history of Islamic law.

In the nineteenth century when most of the Muslim peoples, directly or indirectly, came to be ruled by Western powers, a number of attempts were made to reform the laws of the Muslim peoples. Whether they were attempts to codify or to modify the Muslim laws, the strong religious reaction among the Muslim peoples against such legislative attempts made the reformists aware of the complexities of the problem of change in the Islamic law.

The early colonial policy of non-interference in personal and religious laws, particularly in India, in fact, tended to support the conservatives' view of the immutability of Islamic law.[2]   One of the solutions to avoid interference in personal laws was sought in establishing separate courts for personal and religious matters. This solution required either that these courts should be entrusted entirely to the traditional jurists or that the judges should be assisted by specialists trained in the traditional Muslim laws. The situation led to a series of translations of the traditional texts and their codification along Western patterns. This was the beginning of legislative modernism in Islamic law. The early legislative modernism, however, added a new dimension to the problem. Most of the translators and jurists were lawyers such as Van Den Berg and M. Morand and their attempts at translations and codifications were meant for judges in modern courts. More significantly, most of them were foreigners and non-Muslims. Perhaps naturally they tended to treat the whole body of Islamic law as though it were Western law. At the extreme of their reform efforts, they excluded from the body of Islamic law what they considered as not belonging to Law. The underlying conception in these attempts was that Islamic law, like other laws, could be changed, reformed and codified by government legislation according to social needs. Confronted with orthodox conservative opposition, these men spelled out their views more explicitly by questioning the idea of the immutability of Islamic law[3].

This view of Islamic law was strongly criticised by Islamicists, especially by Snouck Hurgronje[4] and G. Bergsträsser.[5] Hurgronje pointed out that it was a mistake to treat Islamic law like Western law and that Islamic law was a 'doctrine of duties', i.e. ethics and not law in the proper sense. By its nature it was religious law, and as such it was immutable.[6]

Consequently, from that time, as J. Schacht also reported in his lecture on the status of scholarship on Islamic law,[7] there appeared two approaches to the study of Islamic law: one, that of the lawyers, the other, that of the Islamicists. An implicit controversy between these two approaches continues even today on the problem of legal theory and social change. Whereas the lawyers have been inclined to regard Islamic law as adaptable to social change, the Islamicists have stressed the immutable character of Islamic law.

The arguments of the advocates of the immutability of Islamic law can be summed up in the following three general statements:

1. Islamic law is immutable because the authoritarian, divine and absolute concept of law in Islam does not allow change in legal concepts and institutions. As a corollary to this concept, its sanction is divine and hence it cannot change.

2. Islamic law is immutable because the nature of its origin and its development in its formative period isolated it from the institutions of legal and social change — the courts and the state.

3. Islamic law is immutable as it did not develop an adequate methodology of legal change.

The advocates of the adaptability-view disagree with the above conclusions, yet their arguments also turn around these three aspects of Islamic law: concept, history and methodolgy.

It is, therefore, possible to accept these three aspects as general landmarks in surveying the problem of social change and legal theory. The following discussion is, therefore, arranged according to these three aspects.

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THE CONCEPT OF LAW

The argument that the Islamic concept of law is absolute and authoritarian and hence immutable, has been advanced from two points of view. First, with regard to the source of Islamic law it is contended that source of Islamic law is the will of God, which is absolute and unchangeable. The second point of view springs from the definition of Islamic law; there it is demonstrated that Islamic law cannot be identified as law in the proper sense, rather it is an ethical or moral system of rules. The first view, thus, treats the problem of the concept of law in terms of the distinction between reason and revelation. The second view deals with it in terms of the distinction between law and morality.

The arguments in regard to the first view take into account two subject matters: (i) law and theology and (ii) law and epistemology.

J. Schacht has very forcefully argued in his article, "Theology and Law in Islam", that there has always been a close connection between Islamic law and theology; and that certain isolated instances of separatist trends are only accidental. He has demonstrated this connection by the fact that the schools of law and their eponyms showed their interest both in law and in theology.[8] Further, a certain symbiosis of the schools of law and the schools of theology existed throughout the history of Islamic law.[9]

Malcolm H. Kerr also observes that the concept of Islamic law is very firmly grounded in theology.[10]

The connection between law and theology, however, must not be understood in the sense that law was theological so as to be a counterpart of "Divine Law" or "Canon law" as in Christian teachings. "Islam", as Schacht put it, "is a religion of action rather than of belief".[11] Hence a "Theology" in the Christian sense could not be conceived of in Islam. The argument asserting the theological foundations of the concept of Islamic law is advanced simply to stress that the law's source is Divine will, and not human reason.

C.H. Toy has put this idea more neatly by comparing the Greek and the Semitic concepts of law. He found that Semites conceived law as absolute, revealed by God; whereas the Greeks worked out the idea of natural law. The absolute law of the Semites is external, imposed on man from without, by God, while the Greek conception is of an inward law which is part of man's nature.[12]

It appears that arguments holding Islamic law to be theologically grounded are advanced in the sense in which Toy speaks about the Semitic concept of absolute law. The evidences that the advocates of the immutability view present to prove their point confirm our observation.

The first evidence they advance concerns the divinity of the sources of Islamic law. It is argued that Islamic law seeks its basis in Divine Revelation through the Prophet; it is embedded in the Qur'ān and Ḥadīth. Being divine, or divinely inspired these sources are believed to be sacred, final, eternal and hence immutable. It is in this sense that some scholars have understood Islamic law as divine law. Among them N.J. Coulson,[13] H.A.R. Gibb,[14] H.J. Liebesny,[15] M. Khadduri,[16] H. Lammens,[17] G. Makdisi,[18] and particularly J.N.D. Anderson[19] have expressed this view.

Léon Ostrorog,[20] S.G.V. Fitzgerald[21] and some others have disagreed with the view of the scholars mentioned above. They argue that the strictly legal materials in these 'revealed' sources are limited and, indeed, negligible. Furthermore, this material is more concerned with the religious and moral teachings than with matters strictly pertinent to law. The whole body of Islamic law, cannot, therefore, be called revealed and sacred when the amount of legal material existing in the revealed sources is very little.

The second evidence advanced by the advocates of the immutability view takes the question of the sources of law in a more abstract sense. It contends that Islamic law has its source in the Will of God. Since Gibb has expressed this view more succinctly, we quote him as follows:

> The conception of law in Islam is thus authoritarian to the last degree. 'The law, which is the constitution of the Community, cannot be other than the Will of God, revealed through the Prophet'. This is a Semitic form of the principle that 'The will of the sovereign is law', since God is the sole Head of the Community, and therefore sole Legislator.[22]

The concept of the Will of God has theological implications, which render it entirely absolute and immutable. The reason for this situation Gibb finds in the nature of the development of Muslim theology. Because of its stress on monotheism, Islamic theology refused to admit any limitations whatsoever upon the Power and the Will of God. But the frame of reference of these theological discussions was Aristotelian logic rather than metaphysics. Consequently, the theology was forced into extreme positions; one such position is that there could be no agent of any kind in the universe except God, since the existence of an agent implies the possibility of an action independent of God, and, therefore, a theoretical limitation upon the absolute power of God.[23] This conclusion was extended even to 'human acts'; man was not considered the free agent of his acts. This, apparently, would also imply a denial of moral and legal responsibility on the part of man. It would also imply that nothing can be qualified as good or bad except in relation to His will, because the Creation would have no intrinsic value. The knowledge of this value can only be had through revelation and not through human reason; leading to the other subject matter of the concept of law, its epistemology.

The arguments in respect to epistemology of Islamic law have referred to two aspects of the problem, a) the possibility and method of knowing the law, and (b) the role of human reason.

Gibb has brought these points clearly to the fore. He argues that Islamic law is thought of, not as a product of human intelligence and adaptation to social needs and ideals, but of divine inspiration and hence immutable. The Qur'ān and Ḥadīth are not the basis of Islamic legal speculation but only its sources. The real foundation of the law is to be sought in the attitude of mind which determined the methods of utilizing these sources. The ultimate reason of such a mental attitude is metaphysical; an *a priori* conviction of the imperfection of human reason and its inability to apprehend by its sole powers the real nature of the good, or indeed, of any reality whatsoever.[24]

As a corollary of the above concept of the epistemology of law, no primary role is allowed to independent human reason in law making.

Schacht has pointed out that as a consequence of such an epistemological attitude a number of irrational elements have survived in the Islamic law.[25] R. Brunschvig also speaks of the irrationality of Islamic

law in this special sense.[26] G.F. Hourani's distinction of two theories of values in Islam is also concerned with the point we are discussing.[27]

The principle in Islamic legal theory that implies the employment of reason in knowing and interpreting law is *maṣlaḥa*. In fact, both Grunebaum[28] and Hourani[29] have classified it as a rational principle. This classification has been, however, disputed by scholars like Schacht.[30]

The second view, in regard to the concept of Islamic law—dealing with it in terms of the opposition between law and morality—is concerned with its definition. Since law and morality or ethics have a great deal in common, they are often liable to be confused. Hence, any attempt to define law necessarily starts by distinguishing one from the other, law from morality. In defining Islamic law, Islamicists conclude that it is a system of ethical or moral rules. This conclusion must be understood in reference to the separation of law from morality. By defining Islamic law as 'ethics' it is certainly never implied that it is a branch of philosophy; nor is it 'morality' in the sense of having its source in mores and social customs only.

The main aim of the argument in describing Islamic law as ethical law was to refute the modern lawyers' approach to Islamic law as being law in the modern sense. The second aim was to maintain the position that being a system of ethics, Islamic law is not capable of change through legislation. Snouck Hurgronje was the first scholar to advance this argument. He defined, in very clear terms, Islamic law as a 'Doctrine of Duties'.[31] Th. W. Juynboll[32] and others agreed with Hurgronje. G. H.-Bousquet carried this argument to the extent of affirming that Islamic law is idealistic and casuistic, based on imaginative, non-discursive and often rationally absurd hypotheses.[33]

Gibb's elaboration on this point is very succinct. To maintain that Islamic law was a system of ethics would naturally imply that it was a system based on human reason, Gibb explained that it was an ethical system in contradistinction to a legal system; yet it was not a rational or philosophical system as it sought its basis in revelation. The main points in his argument that distinguish Islamic law as an ethical system in contrast to a legal system were the following:

(a) The classification and categories of actions in Islamic law are moral, not juridical. The five categories of obligatory, recommended,

indifferent, reprehensible and forbidden which are to cover all human actions, are moral and ethical.[34]

Schacht, however, made it clear that the ethical nature of the categories of action does not mean that there did not exist any legal subject matter in Islamic law. As a matter of fact, Schacht maintained, the legal subject-matter can be distinguished from other subjects but what is meant by the all-inclusiveness of these five moral categories is that even legal subject-matter is classified as an ethical and religious duty.[35]

(b) Islamic law speaks of "duties", not of "rights". In other words there is much more emphasis on what one ought to do rather than upon what one is entitled to claim as a right. The term *ḥuqūq* even though it means "rights" in a sense, nonetheless, does not contradict the point. In Islamic law, *ḥuqūq* are divided into those belonging to God and those belonging to men. Subsequently, the latter are subordinated to the former, and this, in fact, renders them into religious and ethical duties rather than rights in the strictest meaning.

(c) Penalties and sanctions in Islamic law are religious and moral, not civil and legal. The term used for a penalty, even in matters belonging to penal law, is *ḥudūd Allāh* (the limits of God) which stresses the fact that a certain offence has been committed against God and that it is His right to impose penalty.[36]

Schacht explains further that the other category of penalty called *ta'zīr*, according to which a *qāḍī* (judge) may punish at his discretion any act which, in his opinion, calls for punishment, in fact, did not belong to the Islamic legislation which appears in the Qur'ān and in the tradition of the Prophet.[37] What is implied in this explanation is that the concept of civil penalty which the term *ta'zīr* might convey, originally did not belong to the concept of Islamic law.

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THE NATURE OF ISLAMIC LAW

In the above section on the concept of law we dealt with explanations of how the idea of law is conceived in Islamic legal thought. The present section treats the explanation of the characteristics of Islamic law as it developed historically.

In general, those who took a historical approach for understanding the nature of Islamic law have pointed out the following as its characteristics: I) its idealistic nature, 2) its religious nature, 3) its rigidity, and 4) its casuistic nature. All four characteristics are related to one another and are presented as the reasons for the Law's immutability.

The arguments about the nature as revealed in the history of Islamic law, concern the analysis of the following areas: i) the origins of Islamic law; ii) Islamic law and state legislation; iii) the role of the institution of the *qāḍī*, and iv) the establishment of the schools of Islamic law.

THE ORIGINS OF ISLAMIC LAW

The traditional Muslim point of view, later accepted by a number of modern scholars, maintained that Islamic law began with the Divine Revelation in the Qur'ān and with Prophet Muḥammad's decisions. These decisions as preserved in the large corpus of *Ḥadīth* literature were the foundation of Islamic law.

I. Goldziher's study of the *Ḥadīth* literature from the point of view of its historicity exposed the authenticity of the larger part of this literature to serious criticism.[38] J. Schacht[39] and R. Brunschvig[40] brought this criticism to bear upon that part of the *Ḥadīth* literature that concerned Islamic law. Schacht argued that a large number of legal *aḥādīth* were, in fact, legal doctrines of the early scholars of Islamic law which were projected back to the Prophet in the form of *ḥadīth*, *ḥadīth* being the most acceptable method of establishing a point. Such a criticism of *aḥādīth* has been severely criticized in a number of recent *ḥadīth* studies.

Some scholars also found that there existed in Islamic law a considerable foreign element coming especially from Roman law.[41] As the

ancient schools of law developed in areas where Roman law had been applied before the advent of Islam, these scholars concluded that the origins of Islamic law must be sought in Roman law. This view has been a point of controversy among a number of scholars. Schacht connected the existence of the foreign elements to the *Sunna*. He argued that the ancient scholars, in fact, had assimilated local administrative practices and foreign legal elements into a series of doctrines which they had Islamicized by incorporating them into the *Sunna*.[42]

The need for projection backward to the Prophet, Schacht has argued, was not felt until Shāfi'ī very forcefully presented the thesis of the traditionists and established the sole authority of the Prophet in opposition to the authority of "living tradition".

The bearing of these studies on the origins of the law and upon the problem of the law's immutability lies in their conclusion that Islamic law originated from a pious and religious motivation. This motivation became stronger as the religious element in the law was threatened by the attempts of government in the early 'Abbāsī period to control Islamic law. To save Islamic law from government control, Muslim jurists stressed its religious and divine nature so as to raise it above any human tampering.

Goldziher's and Schacht's criticism on the authenticity of the *Ḥadīth* literature have been questioned in a number of recent studies, but since most of these studies are not directly relevant to the question of the law's origins, they do not concern us here. Two studies are, however, relevant to our discussion.

Fazlur Rahman[43] disagreed with Schacht's conclusion that the *Sunna* of the Prophet was a late concept that emerged in consequence of the development of the *Ḥadīth* movement. Using literary, philological and historical evidences, F. Rahman showed that, contrary to Schacht's argument, the *Sunna* of the Prophet could not have been a late concept. According to F. Rahman, therefore, the origin of Islamic law is to be sought in the early period of Islam.

S.D. Goitein,[44] although he has insisted that his conclusions do not differ from those of Schacht, suggested that the origins of Islamic law may be dated to the year 5/627. Goitein draws his conclusions from a Qur'ānic verse which, he says, establishes Muḥammad's role as law-giver. From the verse he concluded that the idea of Islamic law was not the result of post-Qur'ānic developments but was given by Muḥammad himself.

Besides these differences in determining the historic beginnings of Islamic law, all of the above arguments agree upon the religious nature of its origins.

ISLAMIC LAW AND STATE LEGISLATION

Gibb observed that in Islam the law preceded the state, both logically and in terms of time, and that the state existed for the sole purpose of maintaining and enforcing the law.[45] Gibb argued that in the Umawī period the formulation of the Revealed Law was left in the hands of theologians. The advent of the 'Abbāsī Caliphs brought this scholastic law, for the first time, to the test of practice.[46] Schacht's investigation of the early development of Islamic law explains the above observation historically.[47] As was mentioned above, Schacht concluded that Islamic law began with the activities of the jurists due to religious motives; it was not created by state legislation. This phenomenon resulted in the jurists' conviction of the independence of Islamic law from state control. Certain historical events in the eighth century solidified this attitude further.

In the early 'Abbāsī period the administration of justice was in a chaotic condition because of the lack of unity in juridical doctrines. Ibn al-Muqaffa', a secretary in the 'Abbāsī government, strongly recommended that the caliph control this diversity of opinions by state legislation.[48] The jurists reacted to this suggestion by insisting that the law was superior to the state, and hence not subject to state legislation.[49]

Whether Islamic law maintained this independence in actual practice is a matter dealt with in the next section. What concerns us here is the conclusion that many scholars have drawn from observations on the nature of the law in relation to the state.

H. Lammens and others have argued that, being severed from state legislation, Islamic law became divorced from social realities.[50] G.H.-Bousquet concluded that the idea of successive adaptations to changing circumstances was strange to its system.[51]

Claude Cahen, however, has disagreed with such conclusions. He argues that the problem for the early jurists was not to derive the ideal of Muslim government but rather to institute a very loose filtering which would reserve to them the right of the bestowal upon the regime as a whole of its certificate of 'good Muslim'. He concluded that "it would

be supremely unjust…to regard the work of the 'Abbāsī jurists as abstract and turning the back on reality".[52]

ROLE OF THE INSTITUTION OF QĀḌĪ

The institution of the *qāḍī* evolved out of the pre-Islamic institution of the *ḥakam* (arbitrator). Like the *ḥakam*, the early *qāḍī* was bound by the precedents of local tradition and decided cases, not through some formal methods of reasoning, but according to his own discretion.[53] As Schacht has shown, the decisions of the Umawī *qāḍī* incorporated local elements. In the later development of Islamic law these decisions were assimilated into the body of Islamic law.[54] Yet the role of *qāḍī* was not recognized to be that of making or interpreting the law, but, essentially, only of applying it.

In the 'Abbāsī period the office of *qāḍī* was connected with Islamic law, thus separating it from the general state administration and making it subject to Islamic law only.[55] Later when the schools of law were established, the role of the *qāḍī* was reduced to the application of the teachings of one of these schools. This limitation caused the complete stagnation of the law.

N.J. Coulson, in analysing the causes of the widespread dislike of the office of *qāḍī* among the jurists, concluded that the rejection of the office could not be fully explained by such factors as the fear of sudden political disfavour or as pious motives, such as I. Goldziher, Amerdoz and E. Tyan had suggested. According to Coulson the real cause of dislike of the office was its impracticable and idealistic nature as conceived by the traditionist jurists.[56].

Coulson however, observed a significant distinction in the attitudes of the jurists toward the institution; the distinction between the attitude of the practical lawyers and the attitude of the idealist traditionists. He stresses that this distinction was real and vital in the history of Islamic law.[57] For lawyers Islamic law consisted of enforceable legal rules; for traditionists it was a code of moral and religious duties. The former regarded the office of *qāḍī* as essential and honourable; the latter wished to avoid it at all costs. The attitude of the lawyers was a continuation of the outlook of the early Umawī *qāḍī*s who, as legal secretaries, were responsible to the governor. The other attitude was the result of the growing influence

of the religious concept of law in the eighth century, extending to the office of the *qāḍī*. The morally-inclined *qāḍī*s began to feel that their allegiance lay to religion rather than to the interests of the state.

As a result of this dichotomy there developed two trends of law; the 'religious law' as expounded by the jurists and the 'positive law' as administered by the courts. An example of the latter is the development of *'amal* (juridical practice), as court law in the Mālikī school.[58]

H. Toledano has observed that *'amal* became "an instrument for modifying and adapting the *sharī'a* to meet the practical needs of the society, and the judges in Morocco were filling the same role as their predecessors in the first two centuries of Islam".[59]

THE ESTABLISHMENT OF
THE SCHOOLS OF LAW

As a result of the rapid legal activity from the late Umawī period until the end of the second century, there emerged certain schools of law which were consolidated to the extent that adherence to one of these schools was common and also necessary. This adherence was required not only of the layman but also of the *qāḍī* and the jurist. This requirement was called *taqlīd*.

The effects of *taqlīd* on the growth of Islamic law were fateful. It reduced legal activities to the confines of particular schools. On the one hand, the procedure of legal reasoning became mechanical and, on the other hand, the whole body of Islamic law was cast into a rigid mould, not allowing further independent growth.[60]

The phenomenon of *taqlīd* has been considered by a number of scholars as a factor responsible for the belief in the immutability of Islamic law.

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ISLAMIC LAW IN PRACTICE

Most studies on Islamic law lay stress on the gap between theory and practice. This gap has been so striking that some scholars such as J. Kramers even suggested the existence of two systems of law in Islam: 'droit de l'Islam', the laws in practice, and 'droit islamique', the law in theory.[61].

The cleavage between theory and practice has been observed under three aspects: (i) between Islamic law and the customs of the Muslim people; (ii) between Islamic law as elaborated in Texts and as practiced in the courts; (iii) between different kinds of subject matters in reference to their application.

Although custom was not recognized, theoretically, as a source of Islamic law,[62] yet scholars have observed that custom not only played an important role in the growth of Islamic law but also that it always co-existed with the law.[63].

As for the cleavage between the jurists' law and the court law, scholars have observed that the administration of justice was not completely subject to Islamic law. An evident example of this was the introduction of the courts of *naẓar fī'l-maẓālim* where decisions were reached through individual discretion and *siyāsa*. The jurisdiction of the *qāḍī* was limited, and even there interference by the governor and other government officials in the *qāḍī*'s decision, and restricting his competence in legal matters, was so frequent that, in fact, the applicability of *sharī'a* law in courts was more and more restricted. Consequently, the 'positive law' applied in the courts grew separately from the religious law.

As mentioned above, the *'amal* tradition is an example of the positive law. As a matter of fact, it was assimilated into Mālikī law as a doctrine that had a regulative force. The judges were required to follow it even when it ran contrary to the dominant opinion of the school.[64]

Customary law and the law of the courts that responded to social needs and that were adaptable to social changes ought to have influenced Islamic law. This influence, as observed by the scholars, did operate, but it varied according to the various subject matters of Islamic law.

A.L. Udovitch believes that Bergsträsser was the first scholar who pointed out this influence.[65] He distinguished three broad categories of the subject matters of Islamic law:

1. Ritual, family and inheritance laws, which though they accepted certain changes based on custom, yet remained as a whole closest to Islamic law.

2. Constitutional, criminal and fiscal laws - an area where Cahen believed the jurists to be very flexible[66] - which was constantly being adapted to social changes. In fact, Bergsträsser observed that this category of Islamic law diverged farthest and in some cases completely from the classical formulation of Islamic law.[67]

3. Commercial laws, or to use Schacht's terminology, the laws of contract and obligation, fell somewhere between the two extremes. Schacht,[68] in one of his early statements agreed with Hurgronje[69] who maintained that Islamic commercial law remained for the most part a dead letter.

These observations explicitly show that law in practice was quite adaptable to social changes or rather one can say that with the exception of few areas Islamic law in practice has developed in adaptation to social change.[70]

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THE QUESTION OF METHOD

The significance of the question of method in reference to the immutability of Islamic law has been generally recognized by all scholars. Systems of law tend to be perfect and permanent; hence a sense of immutability gathers around the concept of law. But changing social needs challenge such an attitude. Various systems of law devised methods to meet such challenges. For instance, Roman Law resolved this problem by distinguishing between *jus civile* which was strict and *jus honorarium* which was elastic.[71] In Common Law the flexibility was achieved through Equity.[72]

The question of method in Islamic law has generally been discussed in reference to the classical theory of the 'four sources of Islamic law'.[73]

Modern scholarship also discusses the question of method in reference to the sources of Islamic law. E. Tyan[74] and Ch. Chehata[75] observe that Islamic law did evolve methods to adopt legal theory to changes. Chehata spoke about the principle of *istiḥsān* as being the counterpart of Equity in Common Law.[76] Tyan pointed out three such methods: *istiḥsān, istiṣlāḥ,* and *siyāsa shar'iyya* (administration of justice according to the spirit of Islamic law). All of these methods were devices to incorporate social changes into Islamic law where the strict requirements of Islamic law would not allow this.

Schacht contended that Islamic law did not and could not evolve such methods,[77] mainly because by its very nature Islamic law was not in need of them.

Islamic law was not an official law like other laws. Official law came to be by the authority of secular legislators, but Islamic law did not recognize it. Hence Islamic law was a 'sacred law' par excellence; perfect, immutable, and not in need of change. Schacht maintained that principles such as *'urf, istiḥsān, istiṣlāḥ* and *'amal* were not used as principles of change but rather to interpret and justify the already existing rules of Islamic law. Moreover, if ever they were used to adopt certain changes they were meant to build a protective zone around that particular change lest it affect the whole of the theory.[78]

Malcolm H. Kerr, in his study of Islamic reforms in the nineteenth century, has confirmed Schacht's conclusions. Kerr chose to study the principle of *maṣlaḥa* ("welfare, benefit, utility")[79] because it was considerred by the upholders of the dynamism in Islamic law as a principle of adaptability.[80] He concluded that although theoretically a liberal principle, the *maṣlaḥa* in actual application succumbed to the theological and idealistic limitations imposed upon it by the Islamic legal theory.

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CONCLUSION

The conclusion of this chapter, consists of two parts. First, it deals with definitions of the concepts and terms in reference to the above discussion. Secondly, it defines the assumptions and the manner of argument to be followed in the rest of the study.

Before proceeding to definitions, a general conclusion of the above debate upon the problem of adaptability of Islamic law must be given.

The above discussion shows that the scholars are divided on the question of the adaptability of legal theory to social changes.

The immutability view maintains that the main reason for affirming the unchangeability of the law is that, by its very concept, Islamic law is not adaptable to social changes. In the actual history of the law, because of its self-concept, Islamic legal theory has been divorced from social realities. It has been separated from those institutions which are adaptable to social needs and for that reason could not develop a method of adaptation of its own.

The adaptability view does not differ from the immutability view on the concept of law but they do not give so much significance to this matter; they rather argue from the nature of the law's development. In practice Islamic law accommodated to social changes. The origin of the law came about in response to social needs, and in its subject matter and methodology it showed adaptability to social change.

Both positions, however, admit the view of the opposite group on some points. For instance, the immutability view submits to the opposite position in maintaining that Islamic law was adaptable in its formative period. The adaptability view admits that after the "closing of the gate of ijtihād", Islamic law showed less and less adaptability.

KEY TERMS

A closer look at the above debate also shows that it is the different understanding of the terms that has caused the controversy. What follows is an attempt to redefine the basic terms of the problem.

ADAPTABILITY/IMMUTABILITY

It is clear that the above views have the following questions as a starting point: does Islamic law in fact change? Further, is Islamic law changeable? The two views provide different answers to these questions. The immutability-view claims that Islamic law does not change, adding that in fact it cannot change. The "immutability", to them, therefore, means that the rulings pronounced by Islamic law are static, final, eternal, absolute and unalterable. The adaptability-view, on the contrary, maintains that Islamic law changes and that, in fact, it has changed, and moreover, can be changed further. This view also stresses that law can be changed and modified to fit new social conditions. In other words, "adaptability", in the specific context of the above controversy, is not simply a contrary term to "immutability", but it consists of an additional meaning, i.e. a distinct implication of modifying to meet new conditions.

One may also note that the term "adaptability" has been used by modern scholars in two senses. For the purpose of clarity the two uses of the term must be distinguished. One use of the term means "the possibility of *expanding* the already existing body of law". In the second sense it means "the *openness* of this body of law to *change* (according to social conditions)". The former sense of the term is hardly in question here. With the exception of a few literalists, "adaptability" in the first sense has been always allowed by the jurists on the basis of analogy. In fact, as mentioned elsewhere, the need and method of analogy arose from this meaning of "adaptability".

In this study we are therefore, concerned with the second sense of "adaptability". The other use of the term is secondary, but complementary.

SOCIAL CHANGE

The term "adaptability" is, thus, immediately concerned with social changes.

Social change, here, is obviously not a technical term which implies "transformation of society" or "social control".[81] This term is rather used in a general sense to signify that the change in question has happened in society in response to social needs. A legal change that interacts with such social changes or recognizes the social needs, demonstrates the adaptability of a particular legal system.

ISLAMIC LAW

In the above controversy neither of the views disputes that social changes occurred in Islamic history and that legal changes did take place accordingly, but whereas the adaptability-view connects these changes to the nature of Islamic law, the other view does not. The immutability-view asserts that these changes took place only in practice but were not recognized by the theory of Islamic law. The question is then obviously not about the historicity of legal changes, but about the theory of Islamic law regarding these changes. The difference of the two views is confined, therefore, to the theoretical aspect of the question. Since the two hold opposite views on this point, it is worth investigating whether they mean the same thing when they say "Islamic law", or not.

The adaptability-view refers to *fiqh* as Islamic law, and even *sharī'a* is understood as *fiqh*. The immutability-view is not so monolithic. In reference to the concept of law, Islamic law is identified with *sharī'a*, but even here the arguments about its ethical and moral nature are made in reference to *fiqh*. In the arguments contending that the law is divine and the will of God, obviously it is not the *fiqh* which is meant. In discussions of the nature of the law and practice what is implied by Islamic law is *fiqh*. The contrast between theory and practice is made in reference to *fiqh*.

The reason for this apparent inconsistency and ambiguity is that the immutability view believes that *sharī'a* and *fiqh* are inseparably connected, *sharī'a* being the law, and *fiqh* the science of knowing the law. This explanation, however, does not remove the ambiguity.

To explain this ambiguity we may borrow Kerr's formula of the levels of meaning. He observed the following four levels of meaning implicit in the discussion of juristic theory: (1) Divine Will, the sole metaphysical reality; (2) the spiritual relationship between man and God; (3) the normative relationship between man and man, and (4) the non-normative relationship of man and nature.[82]

In reference to these four levels we may say that *sharī'a* belongs to the first level, and *fiqh* covers both the second and third levels. The third and fourth levels concern social changes. Now social changes would usually have immediate effects on the third level; its effects on the second level are

not immediate, however. In respect of the question of adaptability, therefore, the *fiqh* at level three is more significant than at level two.

In view of this explanation, both positions involve ambiguity in some sense. The adaptability view confuses the first and third levels by equating *fiqh* with *sharī'a*. The immutability view also confuses the two levels. A distinction in these levels can help in demarcating *sharī'a* from *fiqh* and also in distinguishing among various subject matters of *fiqh*.

The question whether *sharī'a* or *fiqh* can be called law is another source of ambiguity. The question stems from the fact that the English term "law" has a special sense which is not conveyed by the Islamic terms. The adaptability view believes that *fiqh* may be called "law". This position is taken by Linant de Bellefonds.[83] He has argued that the theocratic and religious nature of Islamic law has been stressed in an exaggerated manner, by referring to its teachings on *'Ibādāt* (rituals, worship) and by comparing it with Western concepts of law. He maintained that even if the theocratic nature of its origins be admitted, it was not prevented from becoming a juridic system so long as its precepts were sanctioned by a secular authority. Implicit in his argument is the view that *fiqh* became law as much as and whenever it was sanctioned by governors and administrators.

The opposite view contends that *sharī'a*, though not law in the proper sense, is the law of Islam. *Fiqh* is a science that deduces rules of law from the *sharī'a*. Accordingly *sharī'a* is known through the *fiqh*. Does there exist *sharī'a* outside the *fiqh*? Although the answer should be in the affirmative, yet there are different answers to the question of its location. In the abstract sense the *sharī'a* is a metaphysical reality known through the Qur'ān and the sayings of the Prophet. The question whether everything contained in the Qur'ān and *Ḥadīth* is law takes us back to *fiqh*, as that is where the law is spelled out. Hence for practical purposes, even in this position, *fiqh* comes to stand for Islamic law.

ISLAMIC LEGAL THEORY

Now, coming to the question of the legal theory and social change, can we consider *fiqh* to be the legal theory?

Most probably not. In the preceding discussion, to consider *fiqh* as legal theory is possible but only in a limited sense. *Fiqh* cannot stand for legal theory in the sense of principles and methods, because the

branch of the Islamic legal sciences that concerns such matters is *uṣūl al-fiqh*.

Uṣūl al-fiqh is the formal science in which Muslim jurists have dealt with legal theories, the principles of interpretations of legal texts, methods of reasoning and of deduction of rules and other such matters. Thus, this study proposes to mean *uṣūl al-fiqh*, when it speaks of 'Islamic legal theory'.

LEGAL POSITIVISM

In examining Shāṭibī's attempt to free legal obligation from theo-logical determinism, we will interpret such an outlook as a 'positive' element in his legal philosophy. Since our use of the term "positivism" may create some misunderstanding, we must explain that our use of the term is related to, but not identical with the concept of "legal positivism," as upheld by the Analytical School of Jurisprudence to-day.

In this study "positivism" refers to the well-known doctrine which explains the evolution of human thought in three stages: theological-metaphysical - positive. The third stage, positive, seeks to separate philo-sophical thinking from theological and metaphysical modes of thought, and stresses observable phenomena. Historians of legal philosophy, such as Huntington Cairns, attribute this development to the tendency of juris-prudence towards complete independence.[84] Jurisprudence has shown this tendency by breaking with theology in the sixteenth century and culminating in the recent trend which is called "legal positivism" or the Analytical School of Jurisprudence.[85]

Recent exponents of 'legal positivism', such as H.L.A. Hart, have excluded considerations of morality and justice from the concept and definition of legal obligation.[86] Hart has, however, made a significant obsevration at this point. He admits that the origin of the rules of law may be found in the ideas of morality and justice but that this does not prevent legal obligation from separating itself from morality in actual enforcement of law.[87]

This observation will help us in understanding the distinction that Shāṭibī suggests in defining legal obligation in reference to *ta'abbud*.

The suggestion that there is an element of "positivism" in Shāṭibī's legal thinking is advanced as described above. His attempt to free legal theory from theology and morality will be interpreted as a step towards

positivism. Shāṭibī's distinction between '*ādāt* and '*ibādāt* on the basis of observability of *maṣāliḥ* in the former is understood as an attempt to separate positive law from religious elements.

Having defined our terms of analysis, we now come to the second part of the conclusion.

Our framework of discussion in this study consists of two sets of arguments. One part of the argument is that Shāṭibī's concept of *maṣlaḥa* in relation to his doctrine of *maqāṣid al-sharī'a* was the product of the need of his time to adapt Islamic law to the new social conditions. For this part the argument comprises the following steps: 1) A broad picture of the social changes in fourteenth-century Granada (Chapter one) will be drawn to see the extent to which the political, religious and economic develop-ments in this period brought a basic change in Granadian society. 2) We will also see how the legal system may have been affected by these social changes. These observations will then be substantiated with an analysis of the actual *fatāwā* in this period. (Chapter three). Since these *fatāwā* are answers to the actual questions arising out of new social conditions, we will be able to assess to what extent the need for legal change was con-nected with the developments as already observed. 3) This will also enable us to observe how Islamic legal theory dealt with the problem, i.e. what legal concepts and methods were used and whether, in this respect, there was a departure from the legal tradition.

This will lead us to the second part of the argument in our study that Shāṭibī's concept of *maṣlaḥa* is an attempt to justify the adaptability of Islamic legal theory to social needs.   In this regard, the assumptions and premises of our argument are drawn from the above discussion. These assumptions are as follows: First, to determine the adaptability of Islamic law, one must examine whether a certain method or concept, proposed as a theoretical justification of the adaptability, succeeds in freeing the con-cept of legal obligation from the theological determinism that it has received from having its origin in the absolute Will of God. To verify this hypo-thesis, Shāṭibī's concept of *maṣlaḥa* will be examined in this frame of reference. The analysis is undertaken in reference to the development of this concept in *uṣūl al-fiqh*. The purpose of this analysis is to assess the direction in which Shāṭibī wanted this concept to lead.

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NOTES

1. See W. Friedmann, *Law in a Changing Society* (London: Pelican, 1964), 19. In Chapter One, Friedmann surveys the history of this problem in Western legal philosophy.

2. In 1897, in a case (Calcutta, 25:18) before the Privy Council the appellants sought a revision of the decision of a lower court of law. The appellants contended that the decision which was based on the *Hidāya* was not in accordance with the Qur'ān on this point. The Privy Council confirmed the decision of the lower court and declined to go beyond *Hidāya*. Their Lordships explained: "It would be wrong for the Court on a point of this kind, to attempt to put their own construction on the Koran in opposition to the express ruling of commentators of such great antiquity and high authority". Quoted by A.J. Robertson, *The Principles of Mahomedan Law* (Rangoon, 1911), 5.

3. See, for instance, M. Morand, *Introduction à l'étude du droit musulman algérien* (Alger, 1921), 108-112.

4. For example, M.L.W.C. Van den Berg's translation *Minhâdj aṭ-ṭâlibîn, texte arabe publié avec traduction et notations* (Batavia, 1862-1884), was strongly criticized by Hurgronje in his review article in *Revue de l'histoire des religions*, XXXVII (1898), 1-22, 174-203; available to us in G.H. Bousquet and J. Schacht (editors), *Selected Works of C. Snouck Hurgronje* (Leiden, 1957), 214-255.

5. G. Bergsträsser's work, *Grundzüge des islamischen Rechts*, published by J. Schacht in Berlin, 1935. Cf. J.H. Kramers, "Droit de l'Islam et droit islamique" in *Analecta Orientalia: Posthumous Writings and Selected Minor Works of J.H. Kramers*, Vol. II (Leiden: Brill, 1956), 67.

6. *Selected Works, op. cit.*, 256.

7. J. Schacht, "The Present State of the Studies in Islamic Law", in *Atti del Terzo Congresso di Studi Arabi e Islamici* (Naples, 1967), 621-622.

8. J. Schacht, "Theology and Law in Islam", in G.E. Von Grunebaum (ed.), *Theology and Law in Islam* (Wiesbaden, 1971), 4 ff.

9. *Ibid.*, 7.

10. M.H. Kerr, *Islamic Reform* (California, 1966), 56.

11. Schacht, "Theology and Law... ", *op. cit.*, 10.

12. C.H. Toy, "The Semitic Conception of Absolute Law", in Carl Bezold (ed.), *Orientalische Studien Theodor Nöldeke*, Vol. II (Gieszen, 1906), 804. Toy's attribution of natural law to Indo-European people (p. 798) and of external absolute law to Semites has been confirmed in a recent article by Hajime Nakamura in "The Indian and Buddhist Concept of law", published in E.J. Jurji (ed.), *Religious Pluralism and World Community* (Leiden: Brill, 1969), 131-174.

13. N.J. Coulson, *A History of Islamic Law* (Edinburgh: Edinburgh University Press, 1964) 1, 2.

14. H.A.R. Gibb, "Constitutional Organization", in M. Khadduri and H.J. Liebesny (eds.), *Law in the Middle East*, Vol. I (Washington, 1955), 4. Also in Gibb and H. Bowen, *Islamic Society and the West*, Vol. I, part 2 (Toronto: Oxford University Press, 1957), 114.

15. H.J. Liebesny, "Religious law and Westernization in the Moslem Near East", in *The American Journal of Comparative Law*, Vol. II (no. 4, 1953), 492.

16. M. Khadduri, "From Religion to National Law", in J.H. Thompson and R.D. Reischauer, (editors), *Modernization of the Arab World* (Princeton: Nostrand, 1966), 38.

17. H. Lammens, *Islam, Belief and Institutions* (London, 1929), 82.

18. G. Makdisi, "Remarks on Traditionalism in Islamic Religious History" in Carl Leiden (ed.) *The Conflict of Traditionalism and Modernism in the Muslim Middle East* (Austin: University of Texas, 1966), 77.

19. J.N.D. Anderson, *Islamic Law in the Modern World* (New York: New York University Press, 1959), 17.

20. Léon Ostrorog, *The Angora Reform* (London: University of London, 1927), 19.

21. S.G. Vesey-Fitzgerald, "Nature and Sources of Shari'a", in *Law and the Middle East, op. cit.*, 87.

22. Gibb, *Mohammedanism* (New York: Oxford, 1962), 99.

23. Gibb, *Studies in the Civilization of Islam* (Boston, 1968), 204-206.

24. *Mohammedanism*, 90f.

25. Schacht, *Introduction to Islamic Law* (Oxford, 1966), 202-203.

26. R. Brunschvig, "Logic and Law in Classical Islam", in G.E. Von Grunebaum, (ed.), *Logic in Classical Islamic Culture* (Wiesbaden, 1970), 9f.

27. See below pp. 177f,

28. Von Grunebaum, "Concept and Function of Reason in Islamic Ethics", *Oriens*, Vol. XV (1962), 15.

29. G.F. Hourani, "Two Theories of Value in Medieval Islam", *Muslim World*, L(1960), 273, and *Islamic Rationalism* (Oxford: Clarendon, 1971), 8-14.

30. See below pp. 18 and 176.

31. Hurgronje, *op. cit.*, note 6.

32. Th. W. Juynboll, *Handbuch des Islamischen Gesetzes* (Leiden: Brill, 1910), 22f.

33. G.H. Bousquet, *Précis de droit musulman* (Alger, 1947), 44.

34. Gibb, *Islamic Society and the West*, 118.

35. Schacht, *Introduction*, 200-201.

36. *Ibid.*, 176f.

37. *Ibid.*, 207.

38. "Closer acquaintance with the vast stock of *ḥadīth*s induces sceptical caution rather than optimistic trust regarding the material brought together in the carefully com-

piled collections. We are unlikely to have even as much confidence as Dozy regarding a large part of the ḥadīth, but will probably consider by far the greater part of it as the result of the religious, historical and social development of Islam during the first two centuries". Goldziher, *Muslim Studies,* translated by C.R. Barber and S. M. Stern, Vol. II (London: George Allen and Unwin, 1971), p. 19.

39. Schacht, *Origins of Muhammadan Jurisprudence* (Oxford, 1954), p. 4.

40. R. Brunschvig, "Polèmique mediévales autour du rite de Mālik", *Al-Andalus,* XV (1950), 377-435.

41. This point has been a subject of controversy among scholars of Islamic law. The following studies on this subject are noted by S.D. Goitein [in "The Birth-Hour of Islamic Law?" *Muslim World,* L (1960), 23]:

    J. Schacht, "Foreign Elements in Ancient Islamic law", *Journal of Comparative Law,* (1950), 3-4, 9-16;

    A. D'Emilia, "Roman Law and Muslim Law, a Comparative Outline", in *East and West,* Vol. IV/2 (1953);

    Fitzgerald, "The Alleged Debt of Islamic Law to Roman Law", *Law Quarterly Review,* (Jan. 1951), 81-102.

    C.A. Nallino, "The Impossibility of the Influence of Roman Law on Muslim Law" (trans. Hamidullah, *Voice of Islam,* Karachi, 1963, 1/2, 63-67).

42. Schacht, *Introduction,* 19ff.

43. F. Rahman, *Islamic Methodology in History* (Karachi, 1965), 5-21.

44. S.D. Goitein, *op. cit.* 27ff.

45. Gibb, "Constitutional Organization" *op. cit.,* 3.

46. *Mohammedanisn, op. cit.,* 102.

47. Schacht says that "during the greater part of the first/seventh century, Islamic law, in the technical meaning of the term, and therefore, Islamic jurisprudence, did not yet exist", article *"Fikh"* in *E.I.* (2nd edition) Vol. 11, 887-8.

48. Schacht, *Introduction,* 55.

49. *Ibid.,* 56.

50. H. Lammens, *Islam...,* op. cit., 92.

51. G.H. Bousquet, *Prècis...,* op. cit., 50.

52. Claude Cahen, "Body Politic" in Grunebaum, *Unity and Variety in Muslim Civilization* (Chicago: University of Chicago, 1955), 139.

53. Schacht, *Introduction,* 24f.

54. *Ibid.,* 25.

55. *Ibid.,* 4.

56. N.J. Coulson, "Doctrine and Practice in Islamic Law", *BSOAS,* Vol. XIII/2 (1956), 211.

57. *Ibid.,* 226.

58. Cf. J. Berque," 'Amal" in *E.I.* (2nd edition) Vol. I, and H. Toledano, *"The Chapter on Marriage from Sijilmāsī's Al-'Amal al-Muṭlaq: A Study in Moroccan Judicial Practice* (Ph.D. Thesis, unpublished, presented to Columbia University, 1969, Introduction.

59. Toledano, *op. cit.,* p. ii.

60. Coulson, *History of Islamic Law,* 80f.

61. J. Kramers, "Droit de l'Islam et droit islamique", *op. cit.,* 63-64.

62. Schacht, *Introduction,* 62.

63. *Ibid.,* 76ff.

64. For details, see Toledano, *op. cit.,* ii-vii.

65. Abraham L. Udovitch, *Partnership and Profit in Medieval Islam* (Princeton: Princeton University Press, 1970), 7.

66. Cahen, *op. cit.*

67. Udovitch, *op. cit.*

68. Schacht, "Islamic Law", *Encyclopedia of Social Sciences* (Old Edition), Vol. VIII, 348.

69. Hurgronje, *Selected Works,* 260.

70. Udovitch, *op. cit.,* 10.

71. Schacht, "Classicisme, traditionalisme et ankylose dans la loi religieuse de l'Islam", in R. Brunschvig and others, (editors) *Classicisme et dèclin culturel dans l'histoire de l'Islam* (Paris, 1957), 141.

72. Y. Linant de Bellefonds, "Immutabilité du droit musulman et reformes legislatives en Egypte", *Revue internationale de droit comparé,* Vol. VII (1955), 10f.

73. See below pp. 168f., and Chapters four and five in general.

74. E. Tyan, "Methodologie et sources du droit en Islam", *Studia Islamica,* Vol. X (1959), 84f.

75. Chafik Chehata, "Logique juridique et droit musulman", *Studia Islamica,* Vol. XXIII (1965), 5-26.

76. Chehata, "L'équité en tant que source du droit ḥanafite". *Studia Islamica,* Vol. XXV (1966), 123-138.

77. Schacht, "Classicisme...", *op. cit.,* 142.

78. *Ibid., Introduction...,* 61ff.

79. M.H. Kerr, *op. cit.,* 55. Also see below pp. 180ff.

80. *Ibid.,* 56.

81. In maintaining this distinction, we are relying on Amitai Etzioni and Eva Etzioni, *Social Change, Sources, Patterns and Consequences* (New York: Basic Books, 1964), Introduction, p. 7f.

82. M.H. Kerr, *op. cit.,* 21ff.

83. Y. Linant de Bellefonds, *Traité de droit musulman comparé* (Paris: Mouton, 1965), Vol. I, 46-48.

84. Huntington Cairns, *Legal Philosophy from Plato to Hegel* (Baltimore: John Hopkins, 1967), p. 2f.

85. The exact definition of 'legal positivism' has been a subject of debate among recent philosophers. Lone L. Fuller and others contrast "legal positivism" with "natural law" philosophies. H.L.A. Hart regards such a use of the term as a cause of the confusion in modern discussions of separation of law from morals. See the following:

    H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon, 1965), pp. 253-54, and *Law, Liberty and Morality* (New York: Vintage, 1963), p. 2; Lone L. Fuller, *The Morality of Law* (New Haven: Yale, 1970), the chapter: "A Reply to Critic".

86. Hart, *The Concept...* , Ch. 8, section 2; Ch. 9, section 3.

87. Hart, *Law, Liberty and Morality*, Ch. 1.

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PART ONE

SHĀṬIBĪ'S LIFE AND WORKS

Chapters

HISTORICAL
BACKGROUND

As stated in the preceding pages, one part of the argument of the present study is that Shāṭibī's philosophy of Islamic law did not originate in a vacuum, but that it was born in answer to the challenge of social changes and need of his time to adapt legal theory to the new social conditions. The fact is that the fine texture of Shāṭibī's legal philosophy cannot be properly studied without the adequate knowledge of the historical setting in which it evolved. Lack of such an appreciation is the major cause for the difficulty faced by modern scholars in studying Shāṭibī's complex and dense system of legal thought.

Granada, where Shāṭibī lived, underwent very significant, sometimes unprecedented, changes in fourteenth century in which Shāṭibī flourished. Shāṭibī's legal thought reflects a deep awareness of these changes.

Consolidation of political power by Sulṭān Muḥammad V strongly affected the growth and development of almost all the social institutions in Granada. It particularly affected the status and role of fuqahā', and hence of sharī'a in the Granadian society. New educational system, judicial structure, penetration of ṣūfī ṭarīqas and spread of liberal thought all supported by the political system were such factors as were consequential for the intellectual activities of the people of Granada. The economic developments in this period were in fact so significant that they were to change the course

of history in this region. The rise of Mediterranean trade, shift from rural to urban economy, introduction of copper dīnār and other such factors deeply affected the pattern of life in Granada. New forms of business partnerships, contracts and dealings demanded new concepts of legal obligation.

It is with this awareness that this study maintains that a study of Shāṭibī's legal philosophy cannot be separated from the historical setting in which it originated. This Chapter, therefore, attempts to present a broad picture of the political, socio-religious, economic and legal developments in the fourteenth century Granada.

POLITICAL DEVELOPMENTS

FOURTEENTH CENTURY

The fourteenth century was a period of rest for the Muslim world after the turmoils of the thirteenth century. Two major Mongol dynasties, the Ilkhanis and the Golden Horde had been converted to Islam. The Mamlūks who had withstood the Mongol invasion had stabilized their rule in the fertile crescent and in Egypt. In North Africa as well, conditions were rather stable. Banū Marīn had emerged as powerful successors to the Muwaḥḥidūn. In Spain, Banū Naṣr had succeeded the Muwaḥḥidūn. They maintained their rule by keeping a delicate balance of alliance with the Christian kingdoms in Spain and with the Banū Marīn in Africa.

This political stablity provided the much-needed peace for the intellectual activities essential to re-evaluating the tradition in the light of the multitudinous changes brought about by the turmoils of the thirteenth century caused by the Mongol invasion in the Muslim East and by the rapid Christian advances in the Muslim West. These changes affected the political, financial, commercial, social and religious domains. A number of social changes that had taken place needed somehow to be accommodated within the tradition.

The intellectuals of the community who had either personally experienced these changes or been affected through the experience of others received a lasting impact on their minds. This is no doubt the reason why we find that a number of distinguished works dedicated to the re-evaluation, systematization and readjustment of the tradition appeared in this period. In North Africa, Ibn Khaldūn (784/1382) worked on a philosophy of history.[1] In Syria, Ibn Taymiyya (728/1328) reviewed the entire tradition of political and legal theory.[2] In Persia, Al-'Ijī (756/1355) resystematized Sunnī theology.[3] In Spain, Shāṭibī was occupied with the philosophy of Islamic law.

MUSLIM SPAIN[4]

To help build an appreciation of political conditions in fourteenth century Muslim Spain, a brief survey of events in the reign of the Naṣrī

Sulṭān Moḥammad V al-Ghanī Billāh (1354-59, 1362-67) is in order. Such a survey, however, in its turn, requires a review of the rise of Banū Naṣr dynasty for a better understanding of the nature of the political structure that Sulṭān Muḥammad V inherited from his predecessors.

AL-GHÂLIB BILLÂH

With the decline of the Muwaḥḥidūn, the political situation in the Andalus (Muslim Spain) fell into a chaoitc condition.[5] Two warlords appeared in this period: Ibn Hūd in Murcia and Ibn al-Aḥmar in Arjona. Ibn Hūd revolted against the Muwaḥḥidūn in 625/1228 in Murcia.[6] He received investiture from the 'Abbāsī caliph Al-Mustanṣir Billāh (623-640/1226-1242) in Baghdad. Once established as Sulṭān, he assumed the title Al-Mutawakkil Billāh. Important cities such as Almeria, Malaga, Granada, Seville and the greater part of Eastern Andalus fell to him.

Ibn al-Aḥmar declared his independence in 629 A.H.[7] when he captured Jaen. Ibn al-Aḥmar (Muḥammad b. Yūsuf... b. Naṣr b. Qays al-Khazrajī al-Anṣārī) was a soldier who fought on the borders of Andalus. He earned his fame mainly by his campaigns against the Christians. After Jaen, he quickly captured Seville and Cordova from Ibn Hūd.

At the instigation of Ibn Abī Khālid, the people of Granada proclaimed Ibn al-Aḥmar their king. In 634 A.H. Ibn al-Aḥmar moved to Granada and after inflicting a heavy defeat upon Ibn Hūd, captured Granada and declared himself the Sulṭān of Andalus, and assumed the title of al-Ghālib Billāh. Thus was founded in Granada the dynasty of the Banū Naṣr, also called Banū Aḥmar. Ibn al-Aḥmar's only rival was Ibn Hūd who died in 635 leaving Ibn al-Aḥmar the sole Sulṭān of Andalus.

Toward his neighbouring states Ibn al-Aḥmar pursued a policy of truce. He professed submission to his African neighbours and ordered that the name of the Ḥafṣī ruler, Abū Zakariyyā Ibn Ḥafṣ (625-647/1228-1249), be recited in the khuṭba — a sign of allegiance. This gesture was meant to acquire the Ḥafṣī help. He even included the name of the 'Abbāsī ruler in the khuṭba to 'elevate his prestige among his subjects'; later, however, he discontinued the practice.[8]

He concluded peace with Ferdinand III, the king of Castille, in 643 A.H. but this truce cost him the surrender of Jaen. The conditions of the

truce made Ibn al-Aḥmar repent his decision.[9] In 662, however, he signed another peace treaty with the Christians, but also issued an appeal to the African tribes for jihād. It is to be noted that this foreign policy conceived by Ibn al-Aḥmar remained the corner stone of Naṣrī Kingdom for two centuries.

After the decline of the Muwaḥḥidūn there emerged three dynasties among the African rulers; the Ḥafṣīs in Tunis; the Zayyānīs in Tlemcen; and the Banū Marīn in Morocco. Among them the last proved themselves most powerful. It was, therefore, the Banū Marīn who crossed over to Spain in answer to the Naṣrī appeal for help. The relations between the Banū Marīn and the Banū Naṣr, however, bceame a source of trouble internally as well as externally; internally because they headed the African mercenaries and thus held a major source of power in their hands. They were often in conflict with the wazīrs who tried to control them. The balance of power often oscillated between these two major offices. Externally, being related to the Banū Marīn they constituted a threat to both Banū Marīn and Banū Naṣr rulers — to the Banū Marīn as claimants to the throne, to the Banū Naṣr as a pretext for interference by the Banū Marīn in their affairs.

This delicate balance of power continued to be critical for the successors of al-Ghālib Billāh, until this situation changed in the reign of Muḥammad V al-Ghanī Billāh, the eighth ruler in the line of his dynasty.

AL-GHANÎ BILLÂH

At the age of sixteen,[10] Muḥammad V al-Ghanī Billāh succeeded his father in 755/1354 when the latter was assassinated. The affairs of the state were completely in the hands of his chamberlain (ḥājib), the Qā'id Abū Na'īm Riḍwān.[11]

Other important offices of the kingdom were the following: the office of shaykh al-ghuzāt was given to Yaḥyā b. 'Umar; qāḍī al-jamā'a to Abū'l-Qāsim Sharīf al-Sabtī; kātib al-sirr to Ibn al-Khaṭīb. Since these offices played a significant role in the political structure as well as the political development of this period, a detailed analysis of them is attempted in the following lines.

Within a month Ibn al-Khaṭīb and Abū'l Qāsim al-Sabtī were sent on a mission to seek help from the Marīnī ruler, Abū 'Inān, against the

Christians. The Castillian king, Pedro, was occupied with dynastic troubles. He confirmed his truce of 751 made with Muḥammad V's father.[12]

This peaceful situation, however, did not last long. In 760 A.H. a revolt broke out against Muḥammad V. He had two brothers whom Riḍwān had imprisoned in Alḥamrā'. Their mother sought the help of Ra'īs Muḥammad, the head of a contingent of soldiers.[13] Ra'īs killed Riḍwān and proclaimed Muḥammad V's brother, Ismā'īl, as Sulṭān and himself as his regent. Ibn al-Khaṭīb and oher supporters of Riḍwān were imprisoned.

Sulṭān Muḥammad V, however, escaped to Guadix. There he received a visit from Abū'l Qāsim al-Sabtī, his former qāḍī who had joined the Marīnī court. Abū'l Qāsim was sent by Abū Sālim, the Marīnī, who invited Sulṭān Muḥammad V to Fez to express his gratitude for the refuge he had received at the Naṣrī court when he fled from his brother Abū 'Inān. Muḥammad V accepted the invitation. Abū'l Qāsim then proceeded to Granada to negotiate the safe conduct of the Sulṭān to Fez as well as the release of other prisoners, including Ibn al-Khaṭīb.[14] The mission succeeded, and Muḥammad V along with his supporters arrived in Fez in 761 A.H. He received a warm welcome from the Marīnī Sulṭān. This event shows also the immense political influence of the Mālikī fuqahā' in this region.

In the meantime Ra'īs Muḥammad, after assassinating Ismā'īl, had assumed power. King Pedro defeated him in a battle. Shaykh al-ghuzāt deserted to the Christian king to escape the cosequences that he feared would follow if he returned to Granada.

At the same time in Fez, during a revolt, Abū Sālim lost his life.[15] Muḥammad V left for Andalus. To regain his throne Muḥammad V depended very much on the help of the amīrs of Ronda and Malaga. The castle of Ronda which belonged to Andalus had been taken by the Marīnī regent 'Umar b. 'Abd Allāh. Muḥammad V, however, succeeded in regaining it.[16] From there he proceeded to Malaga. Alliance of Ronda and Malaga in favour of the Sulṭān assured his capture of Granada. Ra'īs Muḥammad, who saw himself pressed from both sides, decided to surrender himself to Pedro. There he was treacherously killed. Thus

ground was prepared for the recapture of Granada; Muḥammad V finally remounted the throne in 763 A.H.

Muḥammad V was no longer a youth, and the incident of deposition had been an instructive experience. In his second reign he seemed determined to make himself independent of internal as well as external powers.[17]

He decided to undermine the office of wazīr. He succeeded in routing his wazīr, 'Alī b. Yūsuf b. Kumātha, whom he had been obliged to accept as his wazīr during his stay in Ronda. He sent Ibn Kumātha on a mission to the Marīnī court to get rid of him. On his way Ibn Kumātha heard the news of Sulṭān Muḥammad's successes. He tried, in vain, to instigate the rulers of Castille, Barcelona, and of Tunis against Muḥammad V, but he was finally captured in Castille and sent to prison in Fez.[18]

After a while, Ibn al-Khaṭīb joined Muḥammad V. Following lengthy secret talks and promises, Muḥammad V accepted him as wazīr.[19] Ibn al-Khaṭīb soon prevailed upon the Sulṭān who charged Ibn al-Khaṭīb with the responsibility of almost all the affairs of the government.

The office of the shaykh al-ghuzāt was confirmed for 'Uthmān 'Alī who had deserted Ra'īs Muḥammad. Muḥammad V, however, had the same apprehensions regarding this office as he had had concerning that of wazīr. In 764 he suddenly took captive all the members of shaykh al-ghuzāt's family and expelled them from the political domain. He appointed successively Abū al-Ḥasan 'Alī b. Badr al-Dīn and 'Abd al-Raḥmān b. Abī Sa'īd, both from Banū Marīn, to the office of shaykh al-ghuzāt, but reduced their powers drastically. As a matter of fact, almost all of the military campaigns against the Christians which justified the title of ghāzī, were led by the Sulṭān himself.[20]

The office of qāḍī al-jamā'a was given to Qāḍī Abū'l Ḥasan al-Nubāhī, and the office of the kātib al-sirr to the faqīh and poet Ibn Zumruk.

In 767 A.H. Muḥammad V decided to lead a series of campaigns against the Christians to establish himself as the defender of Islam.[21] Some fortresses close to Malaga and Ronda were taken back from the

Christians. Jaen was recaptured. The campaigns in the years 770 and
771 A.H. were carried out as deep into Christian territory as the neigh-
bourhood of Seville. These campaigns brought a huge amount of booty
to the Muslims.

The success of these campaigns was partially due to internal troubles
in the Christian kingdoms, which did not allow them to attend to the de-
fence of their borders. In this way Muḥammad V's period remained
generally safe from Christian attacks. In fact, we can say that the situa-
tion had reversed itself in the fact that the Christian kingdoms were in a
defensive position against the attacks of Granada.

The same was true for his neighbours in Africa. Muḥammad V
was no longer threatened by powerful neighbours. But this situation was
partially accidental and partially, as we shall note below,[22] due to his
skillful manoeuvres respecting the political affairs of the African rulers.

From the above survey it can be noted that the strength of the Banū
Naṣr depended on two things: first, maintaining a balance between their
neighbours by alternating peace treaties and court intrigues; second, by
controlling the internal sources of power. We will review these two aspects
of the Naṣrī political structure on the following pages.

POLITICAL STRUCTURE

FOREIGN RELATIONS

The Banū Naṣr had Christian neighbours to the north and Muslim
Berbers to the south. Among the Christians the more powerful kingdoms
were those of Castille and Aragon. In Africa there were three kingdoms
as mentioned before. In short, Banū Naṣr had to deal with the Castille
and Aragon on one side and with the Banū Marīn on the other.

From 643 A.H. onwards the Banū Naṣr were vassals of the king of
Castille. According to the conditions of the treaty, the Banū Naṣr, among
other things, were to pay an annual tribute the amount of which fluctuated
from 150,000 to 259,000 *Doblas*. In return, they were entitled to attend
the Castillian court like Christian chiefs. Both parties agreed to supply
troops to each other during war-time.[23]

This status was humiliating both politically and financially, but the
Banū Naṣr were forced to accept and confirm it continuously, first to keep

peace with the Christians and second as a check against the Banū Marīn
designs lest they repeat the role of the Murābiṭūn and Muwaḥḥidūn.

This state of affairs had a social as well as an intellectual impact
upon Granadian society. These treaties allowed an exchange of scholars
and mystics on both sides.[24] The social impact of this situation is evident
from the fact that the Granadian Muslims generally came to accept the
Christian dress.[25]

These changes must have been a challenge to the Mālikī *fuqahā'*
who were known for strict adherence to their tradition.

RELATIONS WITH THE BANŪ MARĪN

In early seventh century Banū Naṣr had depended more on the Banū
Ḥafṣ but later, when the Banū Marīn grew stronger, they leaned towards
the Banū Marīn. In 634 A.H. the Marīnī Sulṭān Manṣūr crossed over to
Spain in answer to the Naṣrī appeal and defeated Sancho of Castille. On
his return, he left behind several Marīnī clans to defend Andalus against
the Christians.[26] These clans played a very active role in Naṣrī politics
because the office of *shaykh al-ghuzāt* remained in their hands.

Banū Naṣr needed Marīnī help against the Christians, but their re-
lelations were not always friendly. Each conspired constantly to weaken
the other. Both provided political refuge to defecting princes, *wazīrs*
and scholars from the other's camp. The Banū Marīn could dictate their
terms[27] as long as they were strong but the situation was reversed during
the reign of Muḥammad V.

The Banū Marīn were heavily defeated by the Christians in 741/
1340[28] and from that time onward were not in a position to stand in aid of
the Banū Naṣr. The regular internal quarrels among the Banū Marīn
during 759-774/1358-1373 weakened them still further. The following
incident worsened terribly the relations between the Banū Marīn and
the Banū Naṣr. The Marīnī wazīr 'Umar b. 'Abd Allāh, who was respon-
sible for a series of dethronements and bloodshed during the period of
762-767, expelled the Marīnī prince 'Alī b. Badr al-Dīn and his *wazīr*
Mas'ūd b. Māsā'ī. They were welcomed in Granada by Sulṭān
Muḥammad V; he even appointed 'Alī as *shaykh al-ghuzāt*. In the mean-
while Sulṭān 'Abd al-'Azīz had taken all powers into his hands after killing

'Umar b. 'Abd Allāh. He was apprehensive of prince 'Alī. He requested the Naṣrī Sulṭān to send the prince and his *wazīr* back to Fez. The Sulṭān refused, but Ibn al-Khaṭīb whom Sulṭān 'Abd al-'Azīz had taken into his confidence, prevailed upon Muḥammad V; yet the latter only agreed to imprison them. The Marīnī Sulṭān accepted but did not like this move. Ibn al-Khaṭīb, apprehensive of the intrigues against him in the Naṣrī court, was planning to escape. Sulṭān 'Abd al-'Azīz welcomed him in the Marīnī court. Now Sulṭān Muḥammad V requested Sulṭān 'Abd al-'Azīz to send Ibn al-Khaṭīb back again to Granada, but he refused. This disagreement soured their relations to the extent that from that point on both the Banū Marīn and the Banū Naṣr spent their efforts in staging intrigues against one another.

Muḥammad V released the Marīnī prince and his *wazīr* and sent the prince as pretender to the Marīnī throne. He even marched toward the Marīnī borders and captured Ceuta to stress his support for the pretender. He succeeded finally in staging a revolt and establishing his own choice on the Marīnī throne.[29] Thus Sulṭān Muḥammad V was able to solve an almost century-old problem. His successes against the Marīnīs brought further security to his rule as well as to the Granadian society in general.

INTERNAL POLITICAL STRUCTURE

The Granadian political structure consisted of three major offices directly responsible to the sulṭān: *shaykh al-ghuzāt*, *wazīr* and *qāḍī al-jamā'a*.

The chief of the *ghāzī*s (warriors for the faith) actually was the office of the head of the armies, both regular armies and mercenaries. This office, according to Gaudefroy Demombynes, was "comparable to that of the *amīr al-'umarā'* in the late 'Abbāsī period."[30] The peculiar tribal structure and allegiance to the chief provided the *shaykh al-ghuzāt* with absolute power.

SHAYKH AL-GHUZAT

The office of *shaykh al-ghuzāt* was introduced to replace the power of the Banū Ashqīlūla who had been responsible for the establishment of the Naṣrī dynasty but who had soon fallen into the custom of revolting against the Banū Naṣr on frequent occasions. To counterbalance their

power the Banū Naṣr welcomed the Marīnī clans left behind in Andalus by the Marīnī Sulṭān Manṣūr. The first *shaykh al-ghuzāt* was appointed from among these Marīnīs.

The *shaykh al-ghuzāt* was given vast powers as is evident from a *ẓahīr* (investiture)[31] conferred upon Yaḥyā b. 'Umar by Sulṭān Abū'l Ḥajjāj Yūsuf (733-755/1334-54). The titles mentioned in the investiture include: 'Pillar of Power', 'Sword of *jihād*', 'The Supremost Head of Defence', 'The Bond of the Kingdom' etc. The part on the description of his authority reads as follows:

> ... He is the chief of the *ghāzī*s in spite of the differences of their tribes and the diversity in their manner of living. The promotions in their grades of acceptance will be determined by his approval... Their salaries will be determined by his assessment. Further allowances will be made to them by his confirmation and recommendation. In all, may God support him, he is the *qibla* (facing point) of their hopes, the balance of their deeds... and it is he with whom the kindness of the administration of their food and prosperity is sought.[32]

'Uthmān b. Abī'l 'Ulā' was the most powerful and illustrious *shaykh al-ghuzāt* in Naṣrī history. 'Uthmān was the chief of the Banū 'Ulā' clan of the Marīnī tribes in West Africa. He had been gathering forces against the Marīnī ruler Abū Yūsuf Ya'qūb (685-706 A.H.). After a few gains 'Uthmān was heavily defeated in 707 A.H. and fled to Andalus with his contingents.[33] He was warmly welcomed in Granada. Despite the threats and the pleas of the Marīnī sulṭān to send 'Uthmān back to Africa for punishment, the Banū Naṣr bestowed upon him the office of the *shaykh al-ghuzāt*.[34]

'Uthmān soon came into conflict with the *wazīr* Ibn Maḥrūq. Ibn Maḥrūq succeeded in suppressing him temporarily. Soon, however, the situation reversed itself. 'Uthmān gathered his troops and besieged Granada. Alfonso, seizing the opportunity, captured a few border towns. Sulṭān Muḥammad IV (725-733 A.H.) was forced to be reconciled with 'Uthmān. To do that he had his *wazīr*, Ibn Maḥrūq, murdered. Muḥammad IV himself, however, met the same fate at a later point when, dissatisfied with the Sulṭān, 'Uthmān's *ghāzī*s assassinated Muḥammad IV in 734 A.H.

Muḥammad IV's son Yūsuf's attempt to replace Banū 'Ulā' with Banū Raḥū, another sub-clan of the Banū Marīn, did not bring about much change. The *shaykh al-ghuzāt* still enjoyd the same powers. Shaykh

'Uthmān b. Yahyā of Banū Rahū participated in the plot against Muham-mad V, and supported the Sultān's rival. He was, however, defeated in a battle against the Castillians and took refuge with them. The Csatillian king Pedro was an ally of the deposed Sultān Muhammad V. He delivered Shaykh 'Uthmān to Muhammad V who reinstated him in his post when the latter remounted the throne.

Muhammad V, however, had decided to break the power of the *shaykh al-ghuzāt*. Consequently within a year he struck out at Shaykh 'Uthmān and banished the entire family from the political scene.[35] He appointed other individuals from Banū Marīn to perform the necessary functions, but he reduced their powers by taking two steps: first, he led most of the campaigns against the Christians himself, thus taking the credit of *jihād* away from the *shaykh al-ghuzāt*. Second, he sent the *shaykh al-ghuzāt* on campaigns against the Banū Marīn,[36] thus discrediting them as *ghāzīs* since they fought against Muslims and their own kith and kin.

WAZĪR

The *wizāra* was the second most powerful office in the Nasrī political structure. Ibn Sa'īd observed that the institution of *wizāra* in Umawī Andalus consisted of a group of notables who assisted the caliph by counsels and aided in the administration. One of them whom the caliph appointed his deputy was called *hājib*. This office became hereditary and continued within certain families. The designation of *wazīr* was lower than that of *hājib*.[37]

During the Nasrī period the emergence of the institution of *shaykh al-ghuzāt* had overshadowed the powers of the *hājib*. Moreover, the offices of *hājib* and *wazīr* were often combined. Some *wazīr*s even claimed to be regents of the minor sultāns whom they succeeded in bringing to the throne. Such *wazīr*s enjoyed the highest powers. Instances of such *wazīr*s are Ibn al-Hakīm al-Lakhmī during the reign of Muhammad al-Makhlū'; Ibn Mahrūq in the period of Muhammad IV, Qā'id Ridwān in the time of Abū'l Hajjāj Yūsuf and Ibn al-Khatīb during the reign of Muhammad V.

Under the *wazīr* were *kuttāb* (secretaries) who held the various offices of civil administration. The *wazīr* also commanded the *shurta* or the city police.[38]

Early Nasrī *wazīr*s such as Abū Marwān b. Sanādīd, who was the ruler of Jaen, and the Qā'id Abū 'Abd Allāh al-Ramīmī, who was the son of the ruler of Almeria, both *wazīr*s of Ghālib Billāh, had powerful family connections. The later *wazīr*s were, however, men of learning, having no such powerful connections. This is why the *wazīr*s depended for their support on diplomatic influence. Their powers were often temporary. Whenever their plots failed, it proved easy to break their power. The *wazīr*s were frequently imprisoned, expelled or assassinated.

QĀDĪ AL-JAMĀ'A

This was the most respected office in the political structure. The *qādī al-jamā'a* was responsible for the administration of justice, the inspection of markets and for regulating commercial contracts. The *qādī al-jamā'a* was also sometimes the chief *khatīb* of Granada.[39]

No executive powers such as the command of soldiers, police, etc., belonged to the *qādī*. It was rather supposed to be the duty of the Sultān to support a *qādī*'s judgment with his executive powers.[40] The Sultān and often the *wazīr*s as well, interfered in the administration of justice; yet symbolically, the qādī enjoyed the highest prestige in the political structure.

In spite of the absence of executive powers, the chief qādī had vast influence in the affairs of the state as he was responsible for the appointment of a significant number of functionaries in the administration of judicial and religious affairs.

The real basis of the qādī's power, as we shall see later in detail,[41] lay in his being part of a sort of 'religious élite' which had grown in strength in the Umawī period and proven itself indispensable ever since.

Qādī al-Nubāhī's success in prosecuting the powerful *wazīr* Ibn al-Khatīb, is one of the recurrent examples of the powers of *qādī*s in the political structure of Muslim Spain.

As stated earlier, Sultān Muhammad V was enraged by Ibn al-Khatīb's defection to Morocco. From certain accounts it appears that there existed a rivalry between Nubāhī and Ibn al-Khatīb. Ibn al-Khatīb, as Ibn Khaldūn has noted, enjoyed the highest powers after the collapse of the office of the *shaykh al-ghuzāt*.[42] He interfered with Qādī al-Nubāhī in many cases. It is evident from certain stories recounted by Ibn al-

Khaṭīb in his *A'māl al-a'lām*[43] and *al-Katībat al-kāmina*, that Ibn al-Khaṭīb went beyond the limits of politeness in ridiculing Nubāhī in the court. Publicly insulting the *qāḍi al-jamā'a* must have undermined the office of *qaḍā'*. This derision was not without the Sulṭān's approval.[44] The Sulṭān must have encouraged the *wazīr* for such a derision to weaken the office of *qāḍi al-jamā'a*. It was only after Ibn al-Khaṭīb had left for Morocco that Nubāhī could accuse Ibn al-Khaṭīb, in public, of heresy and burn his books. In this accusation, of course, he, too, was encouraged by the Sulṭān. The Naṣrī Sulṭān sent Nubāhī to Morocco to bring Ibn al-Khaṭīb back to Spain but he finally prevailed in having him killed in Morocco.

This is how the Sulṭān eventually succeeded in removing a *wazīr* who had become too powerful and, by using the qāḍī to his advantage, also achieved his deisgns to make himself independent of the offices of the qāḍī and *wazīr* both.

By these means the Sulṭān was able to stabilize his rule as absolute king and help Naṣrī dynasty to withstand the forces of decline for many years to come. This political system, however, did not allow political institutions to become strong and powerful enough to work even with weaker sulṭāns who succeeded Sulṭān Muḥammad V.

Politically, the *qāḍi al-jamā'a* had been a very influential office yet the Sulṭān was able to use it to consolidate his own power. This was possible because the religious authority of the *fuqahā'* on which the power of the *qāḍī* depended had been already weakened. This phenomenon is discussed in the next section.

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SOCIO-RELIGIOUS DEVELOPMENTS

We noted earlier[45] how important a role was played by the jurists in political events during the early days of the Sulṭān Muḥammad V, especially by Qāḍī Sabtī and Ibn Marzūq. The significance of the jurists in the political affairs in this period was, in fact, a continuation of the role they had fulfilled from approximately the ninth century.

THE POLITICAL POWER OF THE FUQAHĀ'

The historians of Muslim Spain do not forget to point out the role of the *fuqahā'* in political affairs as a trait of Muslim history in Spain.[46] The various opinions about the significance of *fuqahā'* are not immediately relevant to our purpose. Nevertheless, in general, we learn that scholars have suggested three reasons for the political significance of the *fuqahā'*.

First, some scholars such as Ibn Khaldūn[47] and Goldziher[48] argue that it was the conservatism of the Spanish Arabs that encouraged the spread of Mālikism and that eventually conferred significance on the *fuqahā'* since they were the bastions of this tradition.

The second reason, as suggested by Lopez Ortiz,[49] Hussain Monés[50] and others[51], was the need for the legitimization of their rule as was always felt by the Muslim rulers of Spain. Lopez Ortiz argues that because of their breakaway from the 'Abbāsī caliphs, the Banū Umayya in Spain needed the support of religion to justify their caliphate. Mālik b. Anas, being an antagonist of the 'Abbāsīs, was the ideal choice for them.[52] Monés furthers this argument more strongly in the case of Hishām I and Ḥakam I.

Contrary to the claim made by historians of Hishām I's piety, Monés argues that Hishām, in fact, chose religion for rather political reasons. Hishām felt himself weak in the struggle against the rightful claimant to the throne, Sulaymān, who enjoyed the supoprt of the Syrian contingents of the army.[53] Thus from political necessity on the part of the Umawī rulers there arose a class of *'ulamā'* and *fuqahā'* who played a continuously important role in political affairs.

The third factor, suggested by L.E. Provençal[54] and Roger Idris[55], was the establishment of a kind of 'religious aristocracy' — composed of *fuqahā'* and *'ulamā'* — who comprised of the intellectual as well as the social élite in the capital by the time of Ḥakam I (180-206/796-822). When Ḥakam tried to reduce their influence, they staged two insurrections in Cordova[56]. In these revolts the *fuqahā'* had the support of a number of aristocrats in the court as well as the people in the suburbs of Cordova. These revolts did not succeed but Ḥakam was forced to recognize the power of the *fuqahā'*.

We cannot agree that any one of these factors alone can sufficiently explain the influence of the *fuqahā'*, particularly in the Naṣrī period. Nevertheless, the third factor probably clarifies the phenomenon better than the others.

It is difficult to classify the generality of the Spanish people in the manner of Ibn Khaldūn as having been primitive and conservative. There is much evidence to the contrary. Especially in the Naṣrī period the Spanish people were quite flexible in accepting their Christian neighbours' way of life, particularly with regard to dress and recreational activities.[57] Conservatism was also absent from their ever-changing practices in trade and commerce.[58] There was conservatism, of course, in the intellectual attitude and academic activities of the élite. The latter, however, were probably the result, not the cause, of the conservatism of the *fuqahā'*.

Similarly it is hard to maintain that the rulers' alliance with the fuqahā' was based on the former's need for religious legitimacy. In a society where the rule of a usurper can be justified in the political theory by equating *de facto* with *de jure*[59], the need of a religious institution for that purpose is not very great.

In the case of the Naṣrī claim to the legitimacy of their rule, stress fell upon their Arabness rather than on an any religious doctrine. The tension between Arabs and Berbers had been a salient fature of Muslim Spanish history. The two Berber dynasties, the Murābiṭūn and the Muwaḥḥidūn, had pushed the Arabs aside. With the decline of the Muwaḥḥidūn, the Arab element rose again, as the rise of Banū Hūd and Banū Naṣr manifested. These Arab tribes were supported by the local Spanish element and by the Arab aristocrats. They did not trust the Berbers; they sought

the Berbers' help only temporarily. While the Berbers were inclined more toward religion and piety[60], as expressed by their zeal for *jihād* and *taṣawwuf*, the Banū Naṣr laid stress on genealogical nobility.[61] The founder of the Naṣrī dynasty was called *Marwānī* by a contemporary historian.[62] This shows that the Banū Naṣr in all probabilty wanted to present themselves as a continuation of the Banū Umayya. Later, however they linked themselves with the Khazraj tribe of Madīna. Ibn al-Khaṭīb established the proof of their genealogy from earlier sources[63] and Ibn Zumruk recited eulogies narrating the merits of the Khazrajīs in the days of the Prophet.[64] This very fact that they stressed their descent from the *anṣār* would have been detrimental to their cause if they had been seeking religious support for their legitimacy, in view of the commonly accepted orthodox view of the superiority of the Quraysh over the Anṣār. The nature of the argument shows how much significance the Banū Naṣr gave to the religious aspect of the legitimacy of their rulership.

The foregoing discussion was necessary to show that the need of legitimacy existed but that it was not sought necessarily from the *fuqahā'*. The rulers needed the support of the *fuqahā'* because the latter, through strong family relations and land holdings, had established themselves in Spain as a political power. We need not go into these details; what interests us here is their strength as a political group. We will briefly review the factors of their strength.

The high status that the *fuqahā'* enjoyed in Andalus is evident from the fact that the appelation "*faqīh*" had acquired a sense of nobility. Ibn Sa'īd points out in his narrative of the Andalusian society that:

> The appelation of '*faqīh*' is most honourable for them, so much so that
> if they want to make an honourable mention of their grand *amīr* (*sulṭān*),
> they call him '*Faqīh*'. At present a *faqīh* in the West is what a *qāḍī* is
> in the East. They even sometimes call the *kātib* (secretary), a grammarian
> and a linguist *faqīh* because it is the highest appellation for them.[65]

The factors that contributed to the sustenance of *fuqahā'*s political power were mainly three:

(1) The control of a number of important lucrative offices in the political system;

(2) The control of the institutions of learning;

(3) The control of the movements of free thought.

It was through the operation of these factors that the *fuqahā'* could preserve Mālikī tradition in its conservative mold and hence maintain their power. When they lost control of these factors in the fourteenth century they could no more maintain their religious authority and hence their political power. We will briefly review these elements in the power of the *fuqahā'* in the following pages.

RELIGIOUS AND JUDICIAL OFFICES

The highest religious and judicial office was that of *qāḍī al-jamā'a*, the appellation of the chief *qāḍī* in Granada. The historians sterss that it was the noblest office in the political structure. The evidence for the truth of the claim is to be found in the generous salaries, the ceremonial investitures, and the lengthy formal decrees of appointment given to *qāḍis*. The *qāḍī al-jamā'a* also enjoyed a wide range of prerogatives.[66]

Beside the administration of justice, the *fuqahā'* were officially attached to courts as *muftīs* (jurisconsults), *mushāwirs* (consultants) and *wuththāq* (formularies and notaries).[67] The administration of religious and trust properties was also in their hands. Whenever a ruler made a donation for a special purpose, he appointed a *faqīh* to supervise it. The appointments of Abū 'Abd Allāh al-Ḥaffār (811 A.H.)[68] and Ibn al-Qabbāb (779/1378)[69] were of such nature.

The inspection of trade and commerce was also the domain of the *fuqahā'*. They were responsible for fixing prices and for the quality and weight of commodities in the market. The particular teachings of Islamic law[70] aganist *ribā* (usury) and *qimār* (speculation) prohibited a number of transactions which thus required the supervision of experts in the law, i. e. the *fuqahā'*.[71]

These prohibitions also extended to transactions involving money exchange and minting. The *fuqahā'* were therefore required also to supervise the minting of coins. The important offices in the mint such as *nāẓir al-sikka* were held by *fuqahā'*.[72]

The office of Chief *Khaṭīb* was next to that of *qāḍī al-jam'ā* in importance in the capital city of Granada as well as in other cities and towns in the kingdom. Often both offices of *qāḍī* and *khaṭīb* were held by one person.[73] Since in Islamic history the *sikka* (coining) and *khuṭba* (Friday

sermon) which became the vehicle of the announcement of the ruler's name had become the formal signs of a claim to rulership or to allegiance of one ruler to another, the *khaṭīb* had also become a kind of political office.[74] Attached to the office of *khaṭīb* were a number of other religious offices such as that of the *mu'adhdhin*, etc.

All the above-mentioned offices were lucrative, and often tracts of land, commensurate to their rank, were attached to these offices.[75] This land ownership also contributed to the political power of these office holders.

INTELLECTUAL CONTROL

The status of *fuqahā'* established by their function in the political administration was sustained by their control of intellectual life. This was achieved mainly in three ways :

(1) The control of the institutions of learning;

(2) The suppression of movements of pure rationalism;

(3) Opposition to *taṣawwuf* and *ṭarīqas* as a threat to the political, as well as the economic, system.

We will explain these measures briefly in the following paragraphs.

THE INSTITUTIONS OF LEARNING

Ibn Sa'īd, who visited Andalus in the early Naṣrī period, depicts the conditions of learning in the following words:

As to the conditions of the Andalusians in respect of the art of sciences, the truth of the matter is that they are most eager people in this regard. ... The scholars enjoy the noblest rank among the élite as well as the common people.... Despite the fact that the Andalusians do not have schools (*madāris*) to help them in seeking knowledge, they rather study (learn) all the sciences in mosques on paying fees. Thus they read in order to learn, not in order to earn a stipend.[76]

Ibn Sa'īd praised the Andalusian system as conducive to learing in contrast to the system of the *madrasa* in the Muslim East where the interest of the student was monetary rather than academic.

This conclusion of Ibn Sa'īd stands in contrast to that of Ibn Khaldūn who praised the system in the East saying that the system of

madrsa encouraged learning and made it possible to study even for those students who could not afford to pay fees to individual teachers. On the other hand, the system in the West limited the spread of learning and eventually resulted in the decline of the sciences.[77]

Neither Ibn Sa'īd nor Ibn Khaldūn mentions one significant fact, that learning itself could not have been the sole aim of all the students. The majority of them graduated, thereupon to be given various offices in the administration. The factor that must be emphasized here is that the teachers—who were mostly *fuqahā'* had more influence in the system of the West in comparison to the East.

The institution of learning in the Andalus was completely in the hands of the *fuqahā'*. They were absolutely independent in choosing the materials of teaching, in the manner of teaching and the assessment of the achievement of the pupils. Shāṭibī, dealing with the question of learning, in fact, discouraged the method of learning from the books without a teacher.[78]

This system was advantageous to the *fuqahā'* in two ways. First, it established their influence and supremacy over the people. The *fuqahā'* could not have had this advantage in the *madrasa* system, because in that system they could not be as independent as they were without the *madrasa*. Because of the absence of an institutionalized system of higher learning pupils had to depend on the teachers if they were to get diplomas of graduation.

Second, the Andalusian system made possible the preservation of tradition and strict adherence to it, as well as the control of any ideas or movements that might oppose the tradition.

The *fuqahā'* in the West were certainly aware of their advantages when they opposed the establishment of *madāris*.[79]

The institution of the official *madrasa* was introduced quite late in Spain. Provençal mentions that the first *madrasa* was established by the Qā'id Riḍwān (d. 760/1359) the *ḥājib* of Abū Yūsuf al-Ḥajjāj (733-755/1333 1354).[80] This move was strongly opposed by a number of scholars. Two main arguments were advanced in this respect. First, that it was *bid'a* (innovation), hence prohibited; second, that it suppressed the freedom of the *'ulamā'* and hence the independence of *'ilm* (scholarship).[81]

After the establishment of *madrasa*s, the *'ulamā'* and *fuqahā'* gradually lost their independence. The change did not immediately, however, affect their aristocratic status; but their control over intellectual movements and their resistance to *taṣawwuf* certainly relaxed. It was after the establishment of *madāris* that *taṣawwuf* and *ṣūfī ṭarīqa*s gained a wider following in Granadian society.

CONTROL OF INTELLECTUAL MOVEMENTS

Again the same Ibn Sa'īd says that:

> They (the Andalusians) take part in every scienec with the exception of philosophy and astronomy. These are specially enjoyed by the élite, but they do not show this (interest) in public for the fear of the common people. Because as soon as it is stated that 'so and so studies philosophy' or 'practices astronomy', at once he is declared *Zindīq* (heretic), and his days are numbered (*qayyaḍat 'alayhi anfāsuhū*). If someone showed skepticism (*zāla fi shubhatin*) the people would stone him to death or would burn him alive long before his case was brought to the Sultān.[82]

Ibn Sa'īd's observation is supported by stories that frequently refer to an aversion of philosophy. Ibn Khaldūn narrates that his teacher 'Ābilī used to teach philosophy to Ibn 'Abd al-Salām in secret.[83] The condemnation of the study of philosophy was a very common theme in the literature written by *fuqahā'*.[84] This antagonism had grown to such an extent that even Ghazālī's works were counted as being philosophical.[85] One of Shāṭibī's teachers, Sharīf Tilimsānī, on one occasion was forced by his students to use a certain book by Ghazālī. He dreamt the same night that he was soiling his books in filth.[86]

The outstanding case in Shāṭibī's lifetime was the condemnation of the wazīr Ibn al-Khaṭīb. We need not recount the event which has been mentioned earlier. Qāḍī Nubāhī was asked to bring charges against Ibn al-Khaṭīb.[87] He declared the latter as heretic because of his indulgence in philosophy and other such matters. Qāḍī Nubāhī's attitude to philosophy can be learnt from the following passage in his book pertaining to the administration of justice and the biographies of *qāḍī*s:

> If something relating to the philosophical schools contradicting *sharī'a* or something similar to that is found in someone's handwriting, then the practice (*ḥukm*) in this respect is to study the written material. If it is

clear that it is the opinion of the wirter and (something) to which he agrees,
even though he may deny it verbally, the case will be decided on the basis
of the written material. ...Even if this writing is found only quoting these
philosophical schools without relating the statement to the writer... who
could be worse than the man who possesses such books?...Such books
must be burnt and the man must be punished... "[88]

Towards the middle of 773, Qāḍī Nubāhī announced his *fatwā*
about the books composed by Ibn al-Khaṭīb, relating to beliefs and
morals. These books were burned in the presence of the *fuqahā'* and
mudarrisīn (teachers) and others from the same class as the *fuqahā'*. "This
happened because the afore-mentioned books contained articles that neces-
sitated this action."[89]

Sulṭān Muḥammad V, assisted by Qāḍī Nubāhī and Ibn Zumruk
finally succeeded after a few years' struggle to have Ibn al-Khaṭīb charged
in the Marīnī court as a heretic. He was treacherously killed in prison and
then burnt.[90]

Ibn al-Khaṭīb's tragic death illustrates the extent to which the
fuqahā' could go in their apposition to philosophy. The case of Ibn al-
Khaṭīb also provides evidence to the fact that the reason for opposing
philosophy and such trends was to preserve the supremacy of the *sharī'a*,
the basis of their religious authority. These facts are to be found in
Nubāhī's letter to Ibn al-Khaṭīb which has been preserved in *Nafḥ al-ṭīb*.
Nubāhī charged Ibn al-Khaṭīb saying:

This unfortunate office tenure [Qāḍī Nubāhī's period of *qaḍā'* during
Ibn al-Khaṭīb's *wizāra*] endured the nonsense resulting from your ridicul-
ing the rules of *sharī'a*, and your scorn at matters of religion... Some
of such cases are the following: one of them was the case of Ibn al-Zubayr
who, after payment of his dues, was sentenced to death on account of
heresy (*zandaqa*) despite your disdaining such a decision.

Another case was that of Ibn Abī'l 'Aysh, detained (*muthaqqaf*) in prison
on account of his heterodox statement, one of his heterodoxies was
that he cohabited with his wife after pronouncing the formula of triple
divorces, because he claimed that the prophet himself commanded him
to mate with her. You sent one of your men to secure the escape of Ibn
Abī'l 'Aysh from the prison with no consideration of others. Another
of such cases was that one young man related to you was prosecuted on
the charge of murder. I could not do anything but imprison him accord-
ing to the requirements of religion and the decison of *Sunna*. You detested
this judgment. You imprisoned the plaintiff and immediately released
the above-mentioned young man.[91]

For a fuller undestanding of the contents of this letter it must be
pointed out that Ibn al-Khaṭīb was very much distrustful of the *fuqahā'*.
His reasons for this attitude were the *fuqahā's* general ignorance of the
Arabic language, the lack of piety and too much concern for the mun-
dane matters. He wrote a few treatises combining satire and criticism
on the practices of the *fuqahā'*.[92] The main targets of his writings were
the Qāḍī Ibn al-Ḥasan al-Nubāhī and Qāḍī Ibn al-Qabbāb. It is evident
from Nubāhī's letter that Ibn al-Khaṭīb did not agree with the *fuqahā'*
in condemning heretics to death. His interference in the implementation
of court decisions was considered as ridicule of the *sharī'a*.

Ibn al-Khaṭīb's boldly favourable attitude towards philosophy and
pure thought was made possible among other factors, by the introduction
of Rāzism into Western Mālikism in the thirteenth century.

Fakhr al-Dīn al-Rāzī was responsible for raising the status of *Kalām*
to bring it closer to philosophy,[93] but his influence also meant the revival
of an interest in philosophy—a forbidden science among the conservative
orthodoxy. Rāzism was introduced to Mālikism mainly through *uṣūl al-
fiqh*. This made the acceptance of Rāzism easier, and the resistance to
pure philosophy, though it continued, grew weaker and weaker.

In Eastern Mālikism this impact manifested itself in two works on
uṣūl al-fiqh which were in many ways based on *al-Maḥṣūl*, Rāzī's work on
uṣūl al-fiqh. One of these works was by Ibn Ḥājib (d. 646 A.H., Alexan-
dria), *Muntahā al-su'l wa'l 'amal fī 'ilmay al-uṣūl wa'l-jadal*. The second
was the work by Ibn Ḥājib's pupil Shihāb al-Dīn al-Qarāfī (d. 684 A.H.),
Tanqīḥ al-fuṣūl.[94] Both soon became very popular *uṣūl* texts of the Mālikī
School. Ibn Ḥājib's work had gained currency even in his life time. Con-
sequently he had to prepare an abridged version of it.[95] This abridged
work on *uṣūl* along with another short work on *furū'* were called *Mukh-
taṣar aṣlī* and *Mukhtaṣar far'ī* since they were used as texts in *madāris*.

Ibn Ḥājib's *Mukhtaṣars* were introduced into the Muslim West by
one of his well known disciples, Nāṣir al-Dīn al-Mishdhālī (d. 731 A.H.).[96]
He was one of the three Western scholars who travelled to the East and
served as an agent for the influence of Rāzism on Mālikī thought. The
other two were Ibn Zaytūn and al-Haskūnī.[97] In the West more attention
had been paid to the study of fiqh and Arabic grammar, but under the
influence of these scholars *Kalām* began to be given equal attention.

Philosophy was also making inroads, but it was still a tabu. Some stories, as told by the biographers of this period, indicate that philosophy and other rational sciences were eagerly sought after by certain individuals, but in secret. Such secretly perused texts included those by Ibn Sīnā and Fārābī.[98]

Among the above-mentioned scholars Mishdhālī seems to be critical of Rāzism, although he retained his interest in philosophy. Abū Manṣūr al-Zawāwī and Sharīf Tilimsānī, both of them Shāṭibī's teachers, who were, in Mishdhālī's circle of influence show this critical attitude towards Rāzī and exhibit favour towards the prepatatic school of Islamic philosophy.

Such trends were encouraging freedom of thought and general intellectual activities. Yet, what probably accelerated the spread of movements of free thought the most was the rise of Ṣūfī Ṭarīqas. Even the Mālikī fuqahā' seemed to have failed in their resistance to taṣawwuf which encouraged a relaxed attitude towards the strict legalistic tradition of Mālikism. The reasons for the rise of this phenomenon are dealt in the following pages.

TAṢAWWUF

The absolute supremacy of sharī'a, the palladium of the power of the religious authority of the fuqahā', was threatened by philosophy as well as kalām insofar as these two sciences undermined the authority of sharī'a as the only guide to life. Taṣawwuf, however, probably presented a more direct threat to sharī'a than any other movement of thought. The emphasis on piety, religiosity and moral commitment appealed to intellectuals as well as to the common people. The rise of taṣawwuf in their midst was, therefore, naturally considreed a threat by the Mālikīs in the West.

In addition to this consideration, certain events heightened this feeling of danger. In the twelfth century when Mālikism had been re-established by the Murābiṭūn, the fuqahā' had begun the purge of taṣawwuf from Andalus. Among the ṣūfīs denounced by the fuqahā', the following three were prominent: Abū Bakr Muḥammad from Cordova, Ibn al-'Ārif from Almeria and Ibn Barrajān from Seville. They were persecuted, and all three died in prison. Ibn Barrajān had criticized the Mālikī

fuqahā' very severely for their neglect of Ḥadīth. He succeeded in gathering enough supporters in Almeria to form an opposition that was directed primarily against the fuqahā'.[99]

Another such uprising against the ruling class and the fuqahā' was led by another ṣūfī, Abū'l Qāsim Ibn al-Qaṣiyy, a disciple of Ibn al-'Ārif (1088-1141). This insurrection took place in Algraves region (Southern Portugal) in 1141. Ibn Qaṣiyy was killed in 546/1151.[100]

Viewing taṣawwuf in the perspective of these uprisings, the fuqahā' naturally considered taṣawwuf a threat against Mālikism and against themselves as a class.

One significant victim of this opposition to taṣawwuf was al-Ghazālī's book, Iḥyā 'ulūm al-dīn. One of the earliest reactions to Ghazālī's Iḥyā was that of Abū Bakr al-Ṭurṭūshī (d. 520 A.H.) who wrote a treatise refuting Ghazālī's Iḥyā.[101] The aforementioned ṣūfī, Ibn al-'Ārif, was the first to interpret Ghazālī's Iḥyā in the West.[102] Along with the persecution directed against him came the suppression of Iḥyā. In 537 A.H. 'Alī b. Yūsuf b. Tāshufīn, who also persecuted Ibn Barrajān and other ṣūfīs, ordered that all copies of Iḥyā be burnt in public.[103] Qāḍī 'Iyāḍ (d. 544 A.H.), also issued a fatwā in favour of burning the Iḥyā. Abū'l Ḥasan ibn Ḥirzihim prohibited the study of the Iḥyā and ordered that all of its copies be burnt.[104]

Like other movements of free thought taṣawwuf continued to be considered dangerous both by rulers and fuqahā' until Muwaḥḥidūn toppled this alliance. Although the religious views of the Muwaḥḥidūn, because of their stress on the Qur'ān and Sunna, did not allow absolute freedom to pure thought, yet Mālikism definitely lost its supremacy. Especially in Ya'qūb al-Manṣūr's (580-590 A.H.) reign, a sort of war was declared on Mālikism. He patronized Ibn Ḥazm's school on the one hand and Ibn Rushd's philosophy on the other.[105]

The Muwaḥḥidūn could not, however, destroy the power of the fuqahā' in Spain. It grew stronger. The best illustration is the fact that the Muwaḥḥid Sulṭān Manṣūr under the pressure of Mālikī fuqahā', was forced to expel Ibn Rushd from Cordova.[106]

During this period another movement was gaining force. It grew much stronger in the period of the decline of the Muwaḥḥidūn. We

refer to the establishment of *ṣūfi ribāṭs*. As G. Marçais[107] has pointed out, originally the *ribāṭ* was a military institution, but the mystic movements which began in eleventh century and bloomed in the thirteenth century in North Africa, changed the nature of the *ribāṭ*. The volunteers for *jihād* in the *ribāṭs* were also connected with *ṣūfī ṭarīqas*. The *ribāṭ*, thus, was no longer a military post but also a place for ascetics and travellers. By the thirteenth century the *ribāṭs* were also transformed into *zāwiyas* or centres for certain *ṣūfī ṭarīqas*.[108] By that time every *ribāṭ* had a resident *ṣūfī-shaykh*.

This phenomenon had an effect on the *fuqahā'* intellectually as well as socially.

Spain had resisted *taṣawwuf* successfully but in the thirteenth and fourteenth centuries we find travellers and biographers mentioning the emergence of a number of *zāwiyas*, notable *ṣūfīs* and a number of works on *taṣawwuf*. Ibn Baṭṭūṭa mentions, among other such centres of ṣūfism in Msulim Spain, two *zāwiyas* in the vicinity of Granada: *Zāwiyat al-Maḥrūq*, and *Rābiṭat al-'Uqāb*.[109] Two of the significant works on *taṣawwuf* in the fourteenth century were written by Spanish *ṣūfīs*; Abū Isḥāq Ibrāhīm b Yaḥyā al-Anṣārī (d. 751 A.H.) of Murcia's *Zahrat al-akmām* and Abū 'Abd Allāh Muḥammad b. Muḥammad al-Anṣārī al-Mālaqī's (d. 754 A.H.) *Bughyat al-sālik fī ashraf al-masālik fī marātib al-ṣūfiyya wa ṭarā'iq al-murīdīn*.[110]

This phenomenon affected the intellectual as well as the social status of the *fuqahā'*. The emphasis on piety and simple living in their personal lives by *ṣūfīs* was in sharp contrast to the aristocratic way of life of the *fuqahā'*. This difference in life style might have made *ṣūfīs* more popular than the *fuqahā'* among the common people. This rising influence of *ṣūfīs* among the people and especially among the Berber merecenary volunteers for *jihād*, was also recognized by the rulers who, to establish their piety and influence among the warrior tribes, began to give attention to *ṣūfī* shaykhs and *ribāṭs*.[111] The *fuqahā'* also acknowledged this change, and some of them began to drift towards *taṣawwuf*. This trend is evident from a number of *fatwās* which mention the popularity of ṣūfism among the *fuqahā'*.[112]

The impact of *taṣawwuf* on *fiqh* can be seen in two principal ways. First, the *ṣūfīs* did not abolish the *sharī'a*, but they undermined the status of the *fuqahā'*, by their emphasis on principles of moral commitment (*wara'*

and *zuhd*) to one's obligations. The *fuqahā's* treatment of obligations was rather legalistic. Second, instead of limiting themselves to the fiqh books, the *ṣūfīs* appealed to the Qur'ān and the *Sunna*.

Both of these aspects affected the *fiqh* tradition. The most obvious influence can be seen in the discussions on *uṣūl al-fiqh* in this period. The *fuqahā'* had to make concessions to both principles. Qarāfī discussed *zuhd* and *wara'* as one of the bases of *fiqh*.[113] Ibn 'Abd al-Salām's legal theory is also illustrative of this accommodation.[114]

The influence of *taṣawwuf* had grown very strong by the thirteenth century. At the same time with the passing away of the Muwaḥḥidūn, Mālikism was also rising again. But this rise of Mālikism could no more be a continuation of the past tradition. Mālikism now faced many challenges, social as well as theoretical. Hence in this period *fiqh* and *taṣawwuf* both are actively present on the scene, and both are alive with a rejuvenating spirit. The Banū Marīn and Banū Ḥafṣ who had succeeded the Muwaḥḥidūn, realizing the force of both movements, took steps toward combining the two.[115] They encouraged the *fuqahā'* to concede to *taṣawwuf*. They also began to endow the *ribāṭs* with large trusts.

The *fuqahā'*, realizing the situation, soon accomodated themselves with *taṣawwuf*, but they still held to the supremacy of *sharī'a*. A typical example of this rapprochement was the formation of a new *silsila* (chain of a *ṭarīqa*), whose connection with the Shādhiliyya ṭarīqa is discussed below, which combined the *ṣūfīs* and the *fuqahā'*. Abū 'Abd Allāh al-Maqqarī (d. 758 A.H.), a famous jurist, is also noted for his work on *taṣawwuf*, *Al-ḥaqā'iq wa'l-raqā'iq*.[116] Ibn 'Abbād Rundī (d. 792 A.H.), the famous Shādhilī *ṣūfī*, was one of Maqqarī's disciples of whom he was very proud.[117]

Maqqarī, along with his lectures on *fiqh*, also initiated his pupils into his *silsila* of *taṣawwuf*. The initiation was done with a symbolic act in which the *shaykh* placed a morsel of food into the mouth of the disciple. A most significant indicator of the new conjunction between *fuqahā'* and *ṣūfīs* is to be seen in the names comprising this *silsila*.

Maqqarī — Abū 'Abd Allāh al-Musfir — Abū Zakariyyā al-Maḥyāwī — Abū Muḥammad al-Ṣāliḥ — Shaykh Abū Madyan — Abū'l-Ḥasan b. Ḥirzihim — Ibn 'Arabī — Ghazālī — Abū'l Ma'ālī — Abū

Ṭālib al-Makkī — Abū Muḥammad al-Ḥarīrī (sic) — Junayd — Saqaṭī —
Ma'rūf al-Karkhī — Dā'ūd al-Ṭā'ī — Ḥabīb al-'Ajamī — Ḥasan al-Baṣrī
—'Alī b. Abī Ṭālib — Rasūl Allāh.[118]

This chain has been subjected to criticism by some authors mainly
because of gaps in the chain between Abū'l Ma'ālī and Makkī. Paul
Nwiya, after comparing the presentation of this chain as given by Shāṭibī
with those given by others, maintains that it belongs to the Shādhilī Order
which became better known after Ibn 'Abbād.[119]   The chain comprises
four parts: the first part consists of Maqqarī and Musfir both primarily
faqīhs; it is connected with the second part comprising a chain from
Maḥyāwī to Abū Madyan — primarily ṣūfīs. They are connected again
with the third part consisting of mainly fuqahā'; starting with Ibn Ḥir-
zihim to Abū'l Ma'ālī. They are then connected with the traditional chain
of early ṣūfīs, through Abū Ṭālib al-Makkī.[120]

Nwiya's suggestion about the connection of this chain with the
Shādhiliyya, together with his conclusion that Ibn 'Abbād's reanimation
of the Shādhiliyya was a revival of the early ṣūfism of Muḥāṣibī, also partly
explain the compromise of the ṣūfīs with the fuqahā' in order to exclude the
more comprehensive and radical type of ṣūfism, such as that of Ibn 'Arabī
which the fuqahā' considered a threat to the supremacy of sharī'a.

Having found this compromise possible, the fuqahā' eased their
opposition to taṣawwuf as such. There was, yet, another aspect of taṣaw-
wuf which continued to threaten their status. This threat can be seen in
three ways. First, Ṭarīqa-taṣawwuf required total submission to the
shaykh. This was one of the subjects of Shāṭibī's disputations with his
contemporary scholars. This submission undermined the religious authori-
ty of the fuqahā'. One event (probably an anecdote) illustrates this tension:

Qāḍī Abū'l Qāsim al-Sabtī had two sons. One, Abū'l 'Abbās Aḥmad
became qāḍī; the other, Abū'l Ma'ālī chose the path of "qawm" (ṣūfīs).
He never used or ate anything at his brother's house. After many years
he visited Zāwiya Maḥrūq in the outskirts of Granada. He saw Shaykh
Abū Ja'far Aḥmad al-Maḥdūd and asked him if he could explain a mystery
that had been worrying him. The mystery was that he had a torch that
always showed him light, but suddenly he lost it. The Shaykh asked
the first person entering the Zāwiya to answer that question. This person
who appeared to be an illiterate villager answered that Abū'l Ma'ālī lost
this torch as punishment for some of his actions. After a number of
questions it was revealed that Abū'l Ma'ālī had taught someone the Divine
name of al-Laṭīf which he was not permitted to do. A curse fell on him
as a consequence. He became qāḍī al-jamā'a and died a worldly man.[121]

The second aspect of the threat to the fuqahā' was that a number of
ṣūfī practices such as dhikr and samā' virtually substituted for the rituals
prescribed by fiqh. This could not be tolerated by the fuqahā'. Shāṭibī
goes as far as to declare insistence on such practices in defiance of sharī'a
to be kufr, and condemns the practitioners to death.[122]   To add to the
offence caused by these practices, which were considered bid'a by the
fuqahā', another important development took place.

In the thirteenth century the celebration of the Prophet's birthday
was introduced into the Muslim West. This celebration took place in
mosques. The poets wrote and recited poems for the occasion. Various
forms of dhikr and samā' were also part of the celebration. A significant
factor in this development was the patronage that rulers provided for this
celebration.[123] The fuqahā' could scarcely afford to offer strong resis-
tance to these ceremonies in view of the wide popularity of this "innova-
tion" among all groups of people. The situation forced them, therefore, to
revise their stand on bid'a. Shāṭibī, nevertheless opposed this practice as
we shall see in the following chapter.

The third aspect of the threat was economic. As mentioned
earlier, generous donations and trust properties were given to zāwiyas
and ribāṭs.[124] This wealth attracted a number of devotees as well as
travellers. Ibn Baṭṭūta came across ṣūfīs in these centres from almost all
corners of the Muslim world.[125] Fuqahā' were appointed for the super-
vision of the expenses of such donations, although the supervision and
maintenance of such properties was left to the shaykh of the zāwiya and
his associates.

Some fuqahā' resisted the temptations of ṣūfī ṭarīqas. According
to these fuqahā' the ṣūfī centres were attracting and encouraging idleness
in the society. For many devotees asceticism meant to forsake all worldly
occupations and spend one's life in some zāwiya. The finances of the
zāwiya made it possible to live in such a manner. This practice, however,
was creating a large number of unproductive elements in the society who
were living on the labours of others. For the already stringent economy
of Granadian society this was a very heavy burden.

This economic burden becomes very significant as we shall see that
the Granadian economy was in process of changing from an agricultural
to a commercial and mercantilistic economy. Even the rural areas could
no more support the maintenance of such a burdensome institution as the

ṣūfī zāwiya or *ribāṭ* had become. The problem became acute in the days of Shāṭibī. A distinct economic view of the matter, in contradistinction to the older political and theological view that had motivated the *fuqahā'* to oppose Ṣūfism now came to be.

The inhabitants of a small town Qanālish,[126] an agricultural town on the borders of Aragon, sought a *fatwā* concerning the *shar'ī* opinion about a *zāwiyat al-ghurabā'* in their vicinity. The Chief Qāḍī Al-Balfīqī answered vaguely, justifying the existence of such an institution. The Chief Muftī Ibn Lubb countersigned the *fatwā*. The people of Qanālish, however, mounted a protest against the *fatwā* accusing both *muftīs* of subjecting the people to an unnecessary burden.[127]

The same *istiftā* was then sent to Shāṭibī and Abū 'Abdallāh al-Ḥaffār. Ḥaffār's *fatwā* spelled out the economic aspect in more detail. A few excerpts from this *fatwā* are worthy of notice:

> This band of people who claim their connection with *taṣawwuf*, has caused the severest harm to religion in this period and in this part of the world. Their evils have spread throughout the Muslim world and especially in the fortresses and towns and villages which are farther from the capital... They are more dangerous for Islam than the infidels....

> They have no virtue... None of them knows how to clean himself or to make ablution... In the name of religion they only know how to sing, to utter nonsensical statements and to encroach upon others' property unlawfully...

> What made this band of people adopt this way of life which is so dangerous for the religion? Was it that they needed things basic for the human being, food, drink, clothing and such things, and they did not know any trade or craft to live from? Or if they knew a trade, did they find it hard to toil to earn their livelihood?... The devil seduced them and suggested to them this path which was full of fun and pleasure. They confuse the ignorant with the practice of *dhikr*... wearing patched clothes... as these were the signs of the virtuous people of this path...

> A certain scholar said that the people in a city must be like the parts of the body. As every part of the body has a particular use and none of them is futile... so are the inhabitants of a city. The soldiers guard the city, the *fuqahā'* and judges protect the law (*Sharī'a*) and also teach it... Therefore one who is of no use in a city whereas he is capable of being so... must be expelled from the city.

> A philosopher (*ḥakīm*) taught his disciples to be like bees in a beehive... they do not let any idle members stay there. They would drive it out

> of the hive, because it would cramp their space, would use their honey and would spread idleness, and abandonment of trades....

> It is incumbent upon whoever can do so to restrain these people who are like a gangrenous sore in the side of religion. He must obstruct the way to this group for those who are inclined towards it. He must expel them from these places. (If he does so) he is a warrior of faith (*mujāhid*) in this respect.[128]

The following section examines the economic conditions and developments which shaped the opinions of such jurists. In fact, the change in Granadian economy was also a very important factor in the decline of the religious authority of the *fuqahā'*.

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ECONOMIC DEVELOPMENTS[129]

GEOGRAPHY

Muslim Spain under Banū Naṣr was reduced to the Southern part of Spain. The Naṣrī kingdom extended in the South to the shores of the Mediterranean Sea and the Strait of Gibraltar. For a certain period even the African seaport of Ceuta came within Naṣrī territories. In the North were the principalities of Jaen, Cordova and Seville. In the East it extended to the principality of Murcia and its Mediterranean shores. In the West lay the principality of Cadiz and La Frontera.

The kingdom was divided into three provinces (kūrāt): Gharnāṭu (Granada), Al-Mariyya (Almeria) and Mālaqa (Malaga).

The kingdom was crossed in the middle by the lofty mountains of the Sierra Nevada. The depressed areas were traversed by the river Genil (Shanīl), a tributary of Guadalquivir, and the river Derro. The land was a combination of plains and valleys with thick forests.

The difference between the present geographical conditions and those described by historians is confusing. Today this part of Spain is dry and arid,[130] but the historians vie with each other in praising the fertility and the greenery of this region. The following description by Ibn al-Khaṭīb is typical of other historical geographical descriptions:

> God Almighty has distinguished this country of ours by endowing it
> with lofty hills and fertile plains, sweet and wholesome food, a great
> number of useful animals, plenty of fruits, abundance of waters, com-
> fortable dwellings, good clothing... a slow succession of the seasons
> of the year.[131]

The city of Granada, situated north of the Sierra Nevada, was the capital of the kingdom. By the city flowed the rivers Genil and El Derro. In the Southwest were the meadows of La Vega. Granada was surrounded by approximately 300 small towns (qurā).[132]

POPULATION

Granada in this period attracted a great number of immigrants. Fleeing from the various Spanish territories which had been conquered by Christians, or having been persecuted by Christians, the Muslims came to Granada. In addition, a large number of Berbers kept coming constantly from Africa: they came as ṣūfīs, mercenaries, students or simply as fortune seekers. We have no way of knowing the exact number of the population as the sources generally do not mention it.

Nevertheless, the growing burden of the population in this small kingdom can be seen in the educated guesses in the secondary sources. According to Imāmuddīn, in the days of al-Ghālib Billāh the population in the city of Granada was 150,000.[133] Seybold estimated the figure in the later period as approximately 500,000.[134] Over and above the rising numbers, the ethnic diversity of the population also affected the economy of the kingdom.

The bulk of the population in Granada and other cities was composed of Berbers and Arabs, both usually soldiers and hence fief holders. Spaniards who were mostly cultivators thus worked for both. The Berbers were disliked by the Arabs, who considered themselves culturally more advanced than Berbers, as well as by Spaniard Muslims who inhabited most of the rural areas.

ECONOMY

Generally speaking prior to the eventful impact of the change in Mediterranean trade, the economy of the kingdom had two aspects: urban and rural. The economic activity in rural areas consisted of agricultural and pastoral occupations. In the urban areas the crafts and commerce were the main productive economic activities. Urban economic activity was largely concentrated on luxury goods, hence the actual burden of production fell uopn the rural economy. Village life was severe. This situation forced a number of villagers to go to the cities, which were already few in number. This meant the availability of cheap labour, but since the production of luxury goods had a limited number of consumers, city life also was becoming highly expensive. The impact of Mediterranean trade, however, as we shall see below, shifted the burden of production from rural to urban economy.

PROSPERITY

There was a marked difference in the standards of living even among urban dwellers. The aristocrats who also owned the sources of production lived a luxurious life. Their wealth was distinctly evident in the ornaments and jewellery worn by the women of this class.[135] Their jewellery consisted of such precious stones as emeralds and rubies, and their dresses were embroidered with gold and silver.

It was, in fact, the prosperity of this section of the population which so much impressed travellers such as Ibn Baṭṭūṭa who described Granada as the most prosperous kingdom in the West.[136]

FINANCIAL CONDITIONS

The revenue of the kingdom consisted mainly of taxes collected from lands. According to one secondary source, the yearly income of the kingdom was 1,200,000 ducats.[137] The permanent deposits in the treasury consisted, of course, of precious stones and diamonds,[138] but the expenses of the kingdom were, however, met by the revenue.

The major source of revenue was land tax, called *kharāj*. It was usually 1/9 or 1/10 of the produce, but another 1/5 was also levied as rent of land.[139] Since land was scarce and irrigation facilities were not commonly available, the most fertile lands around Granada were procured by the Sultān. These lands were called *Mukhtaṣṣ* and were leased at very high rent prices. Because of the nature of the lands they were eagerly sought by the people.

In addition to *kharāj*, the other sources of revenue consisted of the customs duties collected from in-coming and in-transit commercial ships in the ports of the kingdom of Granada. Another incidental but frequent source of revenue was the proceeds from raids carried out in enemy territory which brought back prisoners, slaves, and movable properties, etc.

The taxes were collected in kind, but latterly, more emphasis was given to collection of revenue in cash. There was a complex system of tax collection. The tax collectors, called *musharrif*s were responsible to one of the important *kātib*s of the Sultān, called *ṣāḥib al-ashghāl*,[140] The taxes were collected in the name of the *makhzan* which applied to both Islamic and non-Islamic taxes. Even the trust properties belonging to mosques were not exempted.

The provincial and local administration as well as tax collection was in the hands of a *qā'id* in each district.[141]

The expenses of the kingdom were very high. The major expenditure was the tribute paid to the kingdoms of Castille and Aragon. According to Imāmuddīn[142] the amount of such tribute in Ghālib Billāh's days was 250,000 *ducats*. The second major expenditure was the salaries and compensation paid to the soldiers and mercenaries. In addition, large amounts were also paid to the Banū Marīn to recompense the expenses incurred in the preparation for war against the enemies of Granada. Since in both modes of expenditure the terms were cash, the country had been geared to a money economy.[143]

MONEY AND CURRENCY

The Naṣrī currency was similar to that of the Muwaḥḥidūn both in type and value. The basic units of money were the Dīnār and the Dirham. Dirhams were usually silver currency and varied in value and fineness.[144] The Dīnār remained comparatively stable, the quality and quantity of gold helping to stabilize its monetary value.[145] From the legal documents it appears[146] that three types of Dīnārs were in currency: the golden Dīnār, the silver Dīnār and the Dīnār 'Aynī (copper). The golden Dīnār was usually of 2 grams in weight containing 22 carats gold. Its monetary value was equal to 5 to 7 silver Dīnārs or 75 silver Dirhams. The Banū Naṣr struck silver Dīnārs in square shape in contradistinction to the round shape of the golden Dīnār and the dobla (the well-known non-Muslim gold piece). Contrary to the conjectures of early scholars of numismatics,[147] the silver and 'Aynī (copper) Dīnārs were not debased coins; but as studies of documents of contracts in the Naṣrī period show, they seem to have been introduced by the Naṣrī rulers according to fixed monetary values, while the gold piece was accepted in the market according to the current price of gold.

We have here the evidence of a money economy in the form of copper Dīnār. The reason for this development was most probably the rapid growth of trade between Granada and foreign principalities. This trade is discussed at a later point in this section. What concerns us here is the plausible explanation of the copper Dīnār by the fact that because of the need for gold for trade a kind of currency based on credits to the treasury could have been introduced in the form of the copper Dīnār.

Such a development could also be interpreted to mean that because of commercial needs the internal money was devaluated.[148]

AGRICULTURE

Spain had been known for highly developed agricultural methods and ample fertile land,[149] but in the Naṣrī period the extent of Muslim Spain was reduced to Southern Andalusia. The nature of the soil and climatic conditions did not allow a scale of cultivation that permitted self-sufficiency in the production of grains. Often it proved necessray to import grains from North Africa.[150]

The soil seemed to be conducive, however, for the growth of durable plants. Andalus produced a variety of fruits which were eagerly sought at home as well as in foreign markets. For export purposes, however, the cultivation of olives and mulberry trees became very common in the fourteenth century. Even though manufactured with primitive methods, olive oil was also exported. Mulberry leaves used in rearing silk-worms had also gained commercial value.

As mentioned earlier the *mukhtaṣṣ* lands, the best lands of Granada, were leased to cultivators who used to pay the dues in kind. In the fourteenth century, it appears, these lands began to be rented to those tenants who would pay the rent in cash. These tenants hired seasonal labour for cultivation.[151]

By the fourteenth century land had become critically scarce. Evidence of this fact is found in the *fatāwā* literature where various forms of ownership and complex methods of the division of the property and produce are noted.[152]

The ever growing population and the continuous loss of territories to the Christians were also responsible for the fact that extraordinary forms of ownership appeared in the distribution of cultivable land. A small tract of land might be co-owned by a number of persons.[153] Not only that, but the practice of division and subdivision of property extended even to a tree and its branches; a tract of land was divided among its owners by the number of trees; or a tree, when it was owned by more than one, was divided by its branches.[154]

The extraordinarily intense cultivation even forced the people to use or rent the gardens around their houses for agricultural and commercial purposes.[155]

Besides the seasonal crops, fruit cultivation was a major occupation. A highly developed system of irrigation made higher level lands useful for orchards.[156]

In general, however, it appears that the pressure toward a cash economy was forcing even the rural agricultural economy to change into a certain type of economy, which for lack of a better term, we may call "mercantile" economy. It must, however, be made clear that our use of the term 'mercantile' should not be confused with its technical use in a special sense which refers to the sixteenth century 'mercantile policies' in certain European countries.[157] We are using this term in its simple sense to mean a type of economy that lays stress on trade and commerce, and where money as wealth becomes important in preference to land.

Some of the indicators of the rise of this type of mercantilism are the following:

The use of seasonal labour and contract-workers who received their wages in cash or kind at the end of the-contract[158] period was replacing the older system of semi-serfdom for the peasants. Forms of co-operative cultivation and production where partner contributed money in place of land were also current. Evidence for this development is found in the specific cases of rearing of silkworms[159] and of production of cheese.[160]

INDUSTRIES

The existence of gold, precious stones, amber and metals such as copper and iron[161] in the kingdom of Granada encouraged various industrial activities. These industries had become a major base of the Naṣrī economy. Louis Bertrand tells how the Granadians enjoyed "up to a certain point, industrial wealth."[162]

Among others the major industrial centres were Granada, Malaga and Almeria. The following industries flourished: Weaponry, Silk, Pottery, Leather, Cotton and other textiles.[163] The most profitable industry was silk.

The cities that were busy in the silk industry were Jubiles, Granada, and Almeria. In Almeria there were about 800 looms for

brocaded silk and about 1,000 for embroidered silk. Similarly there were looms for other kinds of silk among which the following were well known in the foreign markets: Usqulāṭun, Georgian, Isphania, 'Unābī, Ma'ajir al-Mudahash.[164]

In the fourteenth century, because of the growth of the Italian silk industries, the Granadian silk industry suffered heavily.[165] Nevertheless, the market demands for raw silk material insured that this industry in Granada remained profitable.[166]

CRAFTS

The crafts were usually connected with luxury commodities. Many artisans coming from other parts of Spain, had settled in the kingdom of Granada. This influx advanced not only the development of crafts but also turned the craft-industries toward the production of luxury goods. These crafts concentrated on jewellery, golden silk embroidery, decorative pottery and fancy leather among other things.[167]

TRADE AND COMMERCE

The most significant phenomenon in the economic history of the Islamic West in the fourteenth century was the quick development of a commercial economy. The coastal cities developed significantly along with the growth of their political influence. This is evident in the case of Ceuta, Malaga, Ronda and Almeria. The Alliance of Ronda and Malaga with Muḥammad V al-Ghanī Billāh meant his remounting the throne of Granada.[168] His capture of Ceuta meant a greatly increased influence on Marīnī political affairs.[169]

Besides political influence, these cities also experienced a rapid growth of the textile, metal, leather, dairy, flour-milling, and ceramic industries and other crafts. The produce was largely meant for foreign markets.

The main cause of the quick development of a commercial economy in this area, according to S.M. Bastieva, was the economic upsurge in the Mediterranean countries in the thirteenth and fourteenth centuries. The cause of that development was the sudden growth of manufacturers in Italy.[170] Trade, however, necessarily required relations with foreign nations. The overseas trade of the Italian cities reached its zenith in the fourteenth century. This trade was carried further by the maritime cities of Catalonia, Provence, Constantinople, Alexandria and others. This

activity created a wide Mediterranean market which made possible the enormous upsurge of production there and which was conducive to the appearance of mercantilism in Italy.

The emergence of vigorous trade patterns around the Mediterranean made possible a wide sale of agricultural produce in the foreign market. This in turn, affected Granadian economy by producing a stimulus to commercialize agriculture. Lopez Ortiz, studying the *fatāwā* literature of this period, concluded that in Granada, the agricultural production was moving towards a mercantilized economy.[171]

Among the materials that Florence, Naples, Catalonia and Provence imported were raw leather, processed leather, olive oil, cotton, silk, wax, etc. The main importer of Granadian raw silk was Florence.[172]

The main seaports of Granada, Almeria and Malaga, were situated at very significant points on the Mediterranean trade routes. They were thus, in a favourable position to benefit from the new trade.

Almeria and Malaga were situated on the sea trade route connecting the maritime cities in Western Spain and in West Africa with Naples in Italy. This sea route connected with another sea trade route starting from Seville and giong through Murcia, Valencia, Barcelona and ending in Marseilles. In terms of land trade Granada was connected with a number of trade routes that spread throughout Spain and which were also connected with the maritime cities. Granada was connected with the land trade routes in Africa through Ceuta which was under her suzeranity at that time. These land routes led to Fez, Tlemcen, and Algiers.

The significance given to the safety of these trade routes by the rulers can be seen in the mutual trade pacts between the kingdom and its neighbours in that period. The Banū Naṣr frequently signed trade pacts with their neighbours; or one should perhaps rather say that every treaty included a condition of mutual agreement on the safety of trade routes and merchants. In 684 A.H. in a treaty with Castille the condition read that the Muslim merchants going to Castille would be exempted from taxes.[173] The treaty with Aragon, signed in 695, provided that the cities in the territories of both partners to the treaty would be open to the merchants from both territories and that their lives and mecrhandise would be

safeguarded.[174] In 721 A.H. in the renewal of this treaty an additional condition provided that the boats (ships), shores and ports of each partner would be safeguarded.[175]

Such security pacts with Christian neighbours were essential for the Banū Naṣr as the major part of their trade consisted of exports to Italy by these trade routes. As mentioned above Naples, Catalonia and Provence were the main importers of Granadian commodities.

MONEY LENDING

A natural result of the mercantilistic activities was the growth of a strong and widespread money-lending class. This money-lending class operated both in Christian and Muslim territories. Most probably the intermediaries in such transactions were Jews. In the literature of that period they were called "transgressors and unjust".[176]

These money lenders controlled the markets where agricultural products were brought for auction. They worked also as intermediaries in auctions[177]. They were also responsible for the exchange of currencies. There is also an indication in a *fatwā* that they even determined the values of the currencies.[178]

A peculiar and typical product of this economic and political milieu was *al-Fakkāk*.   The term, originally meaning to separate, disjoin, and redeem,[179] probably under the influence of the Qur'ānic legal term *fakk-u-raqaba*[180] (to liberate someone), came to be used also in commercial legal transactions to mean the redemption of pledges and of debts.[181] Most probably this Andalusian term *al-fakkāk* etymologically springs from that usage. In Andalus this term was applied to an intermediary who was paid by the relatives of a prisoner in the enemy territory to buy the liberty of the prisoner by paying the required amount to the enemy.[182]

To grasp the situation it must be pointed out that despite the truces, payments of tribute, and promises of protection, the Granadians found themselves often invaded by armed bands which cut down fruit trees, carried off crops and cattle and took prisoners. These events were so common that Muslim fraternities along the lines of the French fraternities such as the *Ordre de la Merci* were established to ransom Muslim prisoners and slaves in Christian territory.[183]

Ibn Baṭṭūṭa witnessed such an incident in Spain. He relates the story that on the coast of Marbella four galleys of a Christian band appeared, and after killing a fisherman, captured eleven horseriders who were travelling to Malaga a little distance ahead of Ibn Baṭṭūṭa. When he reached Malaga and arrived at the main mosque, he found the Chief Qāḍī Ṭanjālī already busy talking to a number of jurists and a notable businessman in Malaga. They were collecting a sum to buy back the freedom of the captives.[184]

From the legal literature of this period, it appears that the institution of *al-fakkāk* was an already established practice.[185] Under Muslim influence the Castillians also called such intermediaries *Alfaqueques*. In Castille they were supposed to be responsible for the administration of the property of the prisoners of war.[186]

In Andalus, however, although the institution may have originated from pious and selfless interests, yet by the fourteenth century it was more of a commercial nature than anything else. The *fatāwā* indicate that *al-fakkāk*s used to contact interested persons on both sides and earned a commission from both parties. One *fatwā* shows that *al-fakkāk* bargained about the prices for ransoms, etc., devaluated the currencies, and earned profits from such transactions.[187]

In the light of this and other descriptions of the institution of *al-fakkāk* in the sources, it may be rightly assumed that *al-fakkāk* belonged to the money-lending class. The assumption gains weight since the sources indicate that al-*fakkāk* also traded in silk, advanced money on anticipated earnings and dealt in debased currenices.[188]

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LEGAL DEVELOPMENTS

The data available for this section is particularly scanty. Since a description of the legal system and legal developments, however cursory it may be, is helpful to complete the picture of social changes which is the object of this chapter, this section makes such an attempt.

This section deals first with the legal system and second with legal developments in the fourteenth century Granada.

LEGAL SYSTEM

Reference has already been made to the institutions of qaḍā' and futyā and the place of Mālikism in the legal system.[189] Not to repeat what has already been said, we will briefly recapitulate the main points relating to the legal system.

1. Mālikī *fiqh* was recognized as the law of the kingdom.

2. Mālikī *fiqh* was applied on three levels:

(a) On the level of *futyā*, strictly religious matters including those of exegesis and theology were referred to *muftīs*, and except for cases of heresy,[190] such matters were beyond the courts' jurisdiction. The opinion of the *muftīs* was called *fatwā*, and its implementation largely depended on the individual conscience.

(b) On the level of the courts (*qaḍā'*), the decision of the judge (*ḥākim*) was called *ḥukm*. Although the judge had no executive powers, yet in contradistinction to *fatwā*, the *ḥukm* was enforced by government agency. The *qāḍī* was assisted by a concilium of *fuqahā'* called *mushāwirūn*.[191]

(c) On the level of the notaries (*wuththāq*), the Mālikī *fiqh* was applied to register and validate various kinds of contracts and other types of legal documents. These *wuththāq* were usually *faqīhs* and were often appointed also as *muftīs* and *mushāwirs*.

3. In matters of procedure the litigants sought the *fatāwā* of the *muftīs* in favour of their claims and presented them in the court. The judge reached his decision after consulting the notables in his court. The *qāḍī*'s decision was final in the sense that neither he nor any other judge could revise this decision; in the opinion of some scholars the decision stood as it was even if the witnesses changed their testimony. In certain matters an appeal could be made to the Sulṭān against the decision of the court.[192]

4. Since Mālikī *fiqh* covered all matters relating to religion, ethics, family, property, etc., and the *muftī* could be consulted even on matters which were also in the *qāḍī*'s jurisdiction, a confusion between the jurisdictions of *muftī* and *qāḍī* always existed. The function of the notaries added to the confusion. The notaries were sometimes given limited jurisdictions such as the attestation of a witness or a contract, yet they could not decide a case.

In short, the essential probelm of the Granadian legal system became one of the confusion of the function of *fatwā* and *ḥukm*. The Egyptian Mālikī jurist Qarāfī (d. 684 A.H.), whose influence, as has been mentioned earlier, was felt deeply on Mālikī *fiqh* in Andalus, wrote the following treatise on this problem: *Al-Iḥkām fī tamyīz al-fatāwā 'an al-aḥkām*.[193]

Qarāfī disagreed with the usual distinction made between *fatwā* and *ḥukm* by considering the former as only 'ikhbār (statement) and the latter as 'ilzām (binding).[194] On the contrary, he maintained that both are 'ikhbār 'an ḥukm Allāh (statement about God's command) and both are "binding". According to him a *fatwā* is a statement which implies either 'ilzām or ibāḥa (permission), and the *ḥukm* is a statement which implies either 'ilzam or 'inshā' (preceptive action).[195] In respect of subject matter, the *ḥākim* haṣ jurisdiction only in al-'umūr al-ijtihādiyya (the matters which were not agreed upon among the Mālikī scholars) and al-maṣāliḥ al-dunyawiyya (matters relating to this world); the *ḥukm* has no jurisdiction in 'ibādāt (ritual and worship) and ijmā'.[196]

Qarāfī, however, could not remove the confusion completely as he maintained that both *fatwā* and *ḥukm* form part of the function of the imām (in this case the Sulṭān)[197] but whereas he made the *muftī* responsible to God, he did not define to whom *ḥākim* was responsible.

LEGAL DEVELOPMENTS

Beside the confusion that existed in the functional aspect of Mālikī *fiqh* certain new developments had added more to the confusion. We will briefly mention a few of them.

THE LEGAL STATUS OF ANDALUS

Mālikī *fiqh*, in certain cases, maintains that the legal status of a territory changes according to its political condition; whether it is on peace terms with another territory or at war. In the fourteenth century Andalus was constantly at war or on peace terms with her Christian neighbours. It even had the status of a vassal state to the principality of Castille. A number of questions in the *fatwā* literature show the confusion that this situation created in the application of law.[198]

DIVERSITY OF LAWS

The diversity of laws had a number of causes. In many cases the diversity came about because of the differences in the local practices which were recognized in Andalusian Mālikī tradition as a source of law.

The diversity of laws was also caused by other factors such as the use of the principle of *murā'āt al-khilāf*. These aspects have been discussed elsewhere in detail.[199]

It seems that Ibn al-Khaṭīb became painfully aware of the weakness of the legal system and tried to reform it. He criticised Qāḍī Nubāhī in his treatise *Khal' al-rasan*. He also wrote the following books on legal theory: *Sadd al-dharī'ay fī tafḍīl al-sharī'a*,[200] *Alfiy a fī uṣūl al-fiqh*[201] and *Muthlā al-ṭarīqa fī dhamm al-wathīqa*.[202] In his *Muthlā al-ṭarīqa* he strongly criticised the institution and practice of notaries (*wuththāq*). He condemned them for their ignorance of the Arabic language and of *fiqh*. His essential criticism of this practice was on the basis of *wara'* (moral responsibility) that was completely neglected by the legalistic and formalistic trends in the legal practice.[203]

The little information we possess on the actual legal developments in the Andalus should perhaps be supplemented by comparison with Christian Spain. It is quite probable that developments similar to those in neighbouring areas took place in the Andalus, since both countries underwent the same kind of socio-economic changes. For an understanding of legal de-

velopments in Christian Spain it is quite revealing to notice the various stages through which *Fuero*, an important Spanish legal institution, went.

The institution of *Fuero* existed before the arrival of the Muslims in Spain. It survived under Muslim rule and later became a stronghold of resistance to the renaissance of Roman law in Spain in the thirteenth and fourteenth centuries.

Fuero, deriving its name from *Lex fori*, tribunal justice,[204] came to stand for the legal practice of townships and thus took the name of *Fuero Juzgo*.[205]

Fuero Juzgo also called *Liber Judiciorum* and *Lex Barbara Visigothorum*, was a compromise between Visigothic and Roman law, developed during the seventh century.[206] *Feuro Juzgo* was medley of legal rules which included, among others, subjects such as the following: rules for visiting the sick, the graves of the dead, heretics, etc.[207] Under Muslim rule these Fueros incorporated some Muslim elements as well.[208]

In the thirteenth century the administration was faced with the profusion of all kinds of laws in Spain. The excessive diversity became threatening to the fabric of the state.[209] The progress of trade also demanded system of uniform laws.

By the middle of the thirteenth century a movement for the reform of laws emerged. A long contest between the supporters of Fueros and the supporters of legal unity began. Two weapons were used to reform Fueros: (1) Exposing the shortcomings of the Fuero system and (2) the renaissance of Roman law.[210] Three Castillian kings Ferdinand III (1199-1252), Alfonso X (1221-84) and Alfonso XI (1311-50) are known as staunch supporters of these legal reforms to bring about the uniformity of law.[211]

In the days of Alfonso the Learned another development was also taking place. In Southern France there arose a school which both there and in Bologna supplanted the glossators (medieval commentators on Roman civil law). Instead of seeing in Roman law a multitude of texts to be examined and interpreted, those of the new trend sought to do two things:

(a) systematize Roman law in accordance with the rigid method of Aristotle and in the light of Christian doctrine, and

(b) to ascertain what reasons could have motivated its rules. The trend thus marked the beginning of a philosophy of law.[212]

Many scholars from Spain travelled to Bologna to study and teach Canon Law.   In Spain, the University of Salamanca became an important centre for the study of Roman and Canon law.[213]

The purpose of the above description is to indicate that factors such as the diversity of laws and the need for reform of local legal practices to bring about the uniformity of laws led scholars to investigate the motive and purpose of law. The attempts of these scholars had very far-reaching effects on the evolution of law in Europe in later centuries. Although this evolution came about two centuries after Shāṭibī, it is not irrelevant to refer to it briefly as it helps in understanding the direction to which the legal philosophy was led by the legal developments in Shāṭibī's period.

As a result of the continuous concern for the philosophy of law in Spain there emerged a group of prominent legal philosophers who are now known as "Spanish Theologian Jurists". Two of these jurists are usually described in the following manner: Vitoria (Fransisco de Vitoria d. 1546 in Salamanca), " the expounder of the law of nations" and Suarez,"the philosopher".[214]   Francis Suarez was born in Granada in 1548 and died in Lisbon in 1617.   His influence on the later development of the philosophy of law is well-known. His legal philosophy had its pivotal point in the exposition of the end of law which, according to Suarez was the "Common good of the Community".[215]

Despite the time interval of two centuries between Shāṭibī and Suarez, the similarity in their approach towards law and its end is worth noting. Shāṭibī also investigated the purpose of law and he also found the concept of maṣāliḥ al-'ibād (the good of the people) to be the objective of law.

Unfortunately the similarity in the legal developments in Muslim Spain with that in Christian Spain does not go beyond this point. There is similarity in the socio-economic factors that led to an investigation of the philosophy of law in both Muslim and Christian Spain. Jurists' conclusions about the objectives of the law were the same. Yet whereas in Christian Spain these investigations continued and were responsible for the shaping of the modern concept of law in Europe, among the Muslims this attempt seems to have stopped with Shāṭibī.

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CONCLUSION

The reign of Sulṭān Muḥammad V was relatively speaking a peaceful and politically stable period. This stability was gained by the skillful management of relations with the Christian neighbours and the Marīnī rulers, but more significantly, by the consolidation of the absolute rulership of the Sulṭān.   The Sulṭān succeeded in achieving this goal by weakening and reducing the powers of the shaykh al-ghuzāt, the wazīr and the qāḍī al-jamā'a, which were the major offices of political significance. He used the influence of each office against the others to weaken them all.

Besides, the political power of the fuqahā' declined in the reign of Sulṭān Muḥammad V because the factors that strengthened their religious authority, were no more controlled by the fuqahā'. The introduction of madrasas deprived them of the control of institutions of learning which were, until then, a private business of the fuqahā'. Since the madrasas were now controlled by the Sulṭān, the fuqahā' lost their independence. Consequently, they could no more enjoy the influence on the important administrative offices which were previously filled by their privately-taught pupils. Nor could they resist the penetration of taṣawwuf into the Granadian society.   Rather, as a general trend, they subsequently joined ṣūfī ṭarīqas.

There were only a few jurists who, nevertheless, opposed ṣūfī ṭarīqas. Unlike their predecessors who condemned taṣawwuf mainly because of political reasons, these jurists rejected ṣūfī institutions largely due to economic considerations.

From the economic developments in this period, especially such matters as the emergence of al-fakkāk, the growth of Mediterranean trade, the introduction of the devalued copper Dīnār, and the transformation of agriculture into commercialized forms of cultivation and other such facts, it can be seen that the economy was rapidly changing towards a type of mercantilism. This would imply, among other things, the disappearance of institutions that were based on an agricultural economy and the emergence of new ones.

This would mean also that the Mālikī fiqh had to face some essential changes. To justify new institutions it would not be sufficient to attempt

to accommodate them under some legal fiction or some legal device. The number and nature of these new institutions forced the *fuqahā'* to push the problems they faced back to the fundamental matters of legal methodology and general principles of legal theory.

Among such attempts Abū Isḥāq Shāṭibī's contribution was distinctively significant. His legal philosophy, which is studied in the subsequent chapters, was a comprehensive endeavour to meet the challenges posed by the developments in the changing Granadian society which have been discussed above. After having a broad picture of the historical background of Shāṭibī's legal thought before us, now we proceed to study his life and works in the following chapters.

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NOTES

1. See Muḥsin Mahdī, *Ibn Khaldūn's Philosophy of Hisotry* (Chicago: Phoenix, 1964).

2. See Henri Laoust, *Contribution à une étude de la méthodologie canonique de Taki-d-Dīn Aḥmad b. Taimiya* (Cairo, 1939) and *Essai sur les doctrines sociales et politiques de Takī-d-Dīn Aḥmad b. Taimiya* (Cairo: Imprimerie de l'Institut Français d'Archeologie Oriental, 1939).

3. See Josef van Ess, *Die Erkenntnislehre des Aḍuddīn al-Icī: Übersetzung und Kommentar des ersten Buches seiner Mawāqif.* (Wiesbaden: Steiner, 1966).

4. Not to speak of secondary sources, even the primary sources on the Naṣrī period are often confusing. The confusion of the secondary sources is partly due to their indiscriminate use of the primary sources which are often conflicting. For a general history of the period a critical study of the primary sources is indispensible. The two contemporary historians on whom the later sources have depended are Ibn al-Khaṭīb and Ibn Khaldūn. Not only did these two men belong to different courts which were often enemies to each other, but Ibn Khaldūn also had a particular philosophy of history that stresses the role of tribes and families. These differences make their narratives of the same period conflict with one another. Furthermore, the attachments of the two historians to these courts also fluctuated. These changing loyalties affected their narratives. Ibn al-Khaṭīb revised, added and suppressed much information at various stages of writing the history of this period.

   Only to avoid confusion, we have chosen Ibn al-Khaṭīb's *al-Iḥāṭa fī akhbār al gharnāṭa* (Cairo: Maṭba' Mawsū'āt, 1319 A.H.), as the basic text mainly because this was written before Ibn al-Khaṭīb had been prejudiced against Muḥammad al-Ghanī Billāh. For the events after 771 A.H., mainly for the story of Ibn al-Khaṭīb's persecution, we have relied upon the information in al-Maqqarī, *Nafḥ al-ṭīb* (ed. M.M.'A. Ḥamīd, Cairo: Sa'āda, 1949), which derives its information mainly from Ibn Khaldūn's *Kitāb al-'ibar* (Bayrūt, 1959). We have also used Qāḍī Nubāhī's *al-Marqabat al-'ulyā*, (Cairo, 1948) to supplement *Nafḥ al-ṭīb*. Secondary sources have been used only complementarily.

5. Ibn al-Sa'īd, an African traveller, who visited Andalus at that period described the capricious political attitude of the populace as follows:

   > Their attitude towards a sulṭān can be described by the fact that whenever they find a horserider who distinguishes himself among his peers...they rush to his side and appoint him their king without any consideration for the future...or sometimes there is in the kingdom a soldier of the officer rank (*qā'id*) who has earned fame for his campaigns against the enemy...They offer him the rulership in one of the fortresses..."

Quoted by al-Maqqarī, *Nafḥ al-ṭib, op. cit.,* Vol. I, p. 201. Another evidence of this political confusion is the story narrated by Ibn al-Khaṭīb saying that the Andalusian territories were in the hands of robbers and warlords whose alliance Ibn Hūd sought in order to become the Sulṭān of al-Andalus.
See *al-Iḥāṭa, op. cit.,* II, p. 91.

6. Ibn Khaṭīb: *Al-Iḥāṭa,* II, pp. 90-91. Huici Miranda is of the opinion that Ibn Hūd's insurrection personified Spanish Muslims against the Berber Al-Muwaḥḥidūn. See article "Gharnāṭa" in *Encyclopedia of Islām,* (New Edition), Vol. II, p. 1014.

7. *Al-Iḥāṭa,* II, p. 61.

8. *Ibid.,* p. 62.

9. *Ibid.,* p. 65. Ibn al-Khaṭīb, however, does not mention the events that made Ibn al-Aḥmar repent his submission to Castile. Ibn Khaldūn narrates furhter that in making truce with Ferdinand, Ibn al-Aḥmar was satisfying his anger against Ibn al-Jadd, the ruler of Seville. He supported the Christians in every manner. But when Ferdinand was not content with taking Cordova and Seville but went on capturing more fortresses and important towns, Ibn al-Aḥmar was irritated and repented his decision. See Gaudefroy Demombeynes "Histoire des Benou'l Aḥmar", (translation from Ibn Khaldūn's *Kitāb al-'ibar* in *Journal Asiatique,* 9th series, Vol. XII (1898), p. 325.

10. Ibn al-Khaṭīb (*Iḥāṭa,* II, p. 59) mentions that Muḥammad was born on 22 Jumāda al-'ākhira in the year 739 A.H.

11. *Ibid.,* p. 4.

12. *Ibid.,* p. 9.

13. Ibn al-Khaṭīb attributes this revolt to the negligence of Riḍwān. *Ibid.,* p. 11.

14. Ibn Khaldūn, *Kitāb al-'ibar,* Vol. VII, p. 637.

15. Ibn Khaldūn provides more details of this event. For him the cause of this revolt was the faqīh Ibn Marzūq—a scholar and ṣūfī connected with the ribāṭ of Abū Madyan. Ibn Marzūq was so influential that Abū Sālim had left almost all of his affairs in Ibn Marzūq's hands. This antagonized other officers at the court. Consequently, 'Umar b. 'Abd Allāh, the Wazīr at the court conspired with Garcia Antoine, the Andalusian Christian who was at the head of the mercenary soldiers. Abū Sālim was killed. Soon after 'Umar b. 'Abd Allāh, apprehending the plan of Garcia, succeeded in assassinating him and thus became the virtual ruler. Ibn Khaldūn, *Kitāb al-'ibar,* Vol. VII, pp. 648ff.

16. Ibn al-Khaṭīb gives no detail, and mentions the name of 'Umar b. 'Abd Allāh in derogatory terms (*Khabīth* : wicked), *Iḥāṭa, op. cit.,* p. 14. But Ibn Khaldūn, giving the details, takes the credit to himself. He narrates that 'Umar b. 'Abd Allāh was his friend, and that he advised 'Umar to surrender Ronda to Sulṭān Muḥammad V (*Kitāb al-'ibar, op. cit.,* p. 694). Ibn al-Khaṭīb, in *A'māl al-a'lām fī man būyi'a qbal al-iḥtilām* (ed. Lévi-Provencal. Bayrūt, 1956 p. 314) however, takes credit for this event to himself by mentioning the same reasons that Ibn Khal-

dūn gives. Interestingly enough at another place Ibn Khaldūn mentions that 'Umar b. 'Abd Allāh, who, after killing Abū Sālim had taken over the Marīnī throne, was looking for a proper candidate for the throne from the Marīnī family. He found the Marīnī prince Muḥammad, then in the custody of the Castillians, to be the most porper choice. Since Muḥammad V was on good terms with the Castillians, 'Umar b. 'Abd Allāh promised him the surrender of Ronda if he would procure the release of the prince from Castile. (Vol. VII, p. 659).

17. Ibn al-Khaṭīb mentions this in reference to two offices: in case of the Wizāra, he says: "His prudence demanded to neglect this office entirely, even though it was essential in the political and financial administration. [This resolution was made] to avoid the evils that had come out of it before…". (*Iḥāṭa,* II, p. 15). He repeats the same reference in case of Shaykh al-ghuzāt (p. 20).

18. *Al-Iḥāṭa* II, p. 17.

19. *Ibid.*

20. *Ibid.,* p. 48 ff.

21. The details of these campaigns are provided by Ibn al-Khaṭīb, *al-Iḥāṭa,* II, pp. 48-59.

22. See pp. 43 ff,

23. Imamuddin, *Political History of Spain,* (Dacca: Najma, 1961), p. 284. Also 'Inān, *Nihāyat al-Andalus* (Cairo: Maṭba' al-Miṣr, 1958) p. 36.

24. 'Abbādī, in his comments on Ibn al-Khaṭīb's *Mi'yār al-ikhtibār* (*Mushāhadāt Lisān al-Dīn Ibn al-Khaṭīb fī bilād al-maghrib wa'l Andalus,* Iskandariya, 1958, p. 99 n.2) notes that this exchange was well known. Many Spanish Christians knew Arabic; similarly, many Andalusian Muslims knew the Castillian and Aragonese languages. Frequent debates and disputations on religious and academic subjects took place. Ibn al-Khaṭīb states that a Muslim scholar Muḥammad b. Lubb al-Kan'ānī, wandered in Spanish lands debating with priests. Another, Muḥammad Rāqūtī went to Murcia to teach Jews and Christians. 'Abdullāh b. Sahl was well known in mathematics. His fame reached as far as Toledo, and many scholars came to Baeza to study with him.

25. 'Inān, *Nihāya…op. cit.,* p. 432; *Nafḥ al-ṭib.* Vol. I. p. 207.

26. Muḥammad Riḍwān al-Dāya (ed.), Ismā'il Ibn al-Aḥmar, *Nathīr farā'id al-jumān fī naẓm fuḥul al-zamān,* (Cairo, 1967), Introduction: p. 17.

27. Lévi-Provençal, "Naṣrids" in *E. I.* (1st edition), III, p. 879.

28. 'Inān, *Nihāya,* p. 117.

29. For the lengthy details of this event see Ibn Khaldūn, *al-'Ibar…*Vol. VII, pp. 695ff.

30. Gaudefroy Demombynes, "Histoire des Benou'l -Aḥmar", p. 340: n. 61

31. This *Ẓahīr* is mentioned by Ibn al-Khaṭīb in his *al-Iḥāṭa* in those parts which still remain in MS. preserved in the historical section of Gayangos Collection. We are quoting it here from the excerpts in an article by Muḥammad Kamāl Shabāna' "Shuyūkh ghuzāt al-maghāriba fī andalus kamā arrakha lahum Ibn al-Khaṭīb fī *al-Iḥāṭa*" in *al-Baḥth al-'ilmī*, (December-January, 1968), pp. 134-136.

32. *Ibid.*, 135f.

33. *Ibid.*, pp. 125-126.

34. The details are given by Ibn al-Khaṭīb, *Kitāb a'māl al-a'lām*, *pp.* 296-298.

35. Ibn al-Khaṭīb, *Al-Iḥāṭa*, Vol. II, p. 20.

36. For details see the notice of Muḥammad al-Ghanī Billāh in Ibn al-Khaṭīb, *al-Iḥāṭa*, Vol. II, pp. 48-59.

37. As quoted by Maqqarī, *Nafḥ al-ṭīb*, Vol. I,. p. 202.

38. 'Inān, *Nihāyat al-andalus, op. cit.*, 426.

39. *Ibid.*

40. Abū'l Ḥasan al-Nubāhī, *al-Marqabat al-'ulyā...*, p. 49.

41. See below pp. 51 ff.

42. Ibn Khaldūn, *op. cit.*, p. 694.

43. Ibn al-Khaṭīb, *A'māl...* pp. 78-79.

44. *Al-Katībat al-kāmina fī man laqaynāhu bi al-andalus min shu'arā' al-mi'at al-thāmina*, ed. Iḥsān 'Abbās, (Bayrūt: Dār al-Thaqāfa, 1963) pp. 146-152.

45. See above p. 39 and p. 84 n. 15.

46. See for instance: R. Dozy, *Histoire des musulmans d'Espagne*, Vol. I (Leiden: 1932), pp. 286ff; and Lévi-Provençal, *Histoire de l'Espagne musulmane*, Vol. I (Paris, 1950) pp. 149ff.

47. Ibn Khaldūn, *Muqaddima* (Cairo, 1320 A.H.), p. 425.

48. I. Goldziher, "The Spanish Arabs and Islam", trans. from Spanish by J. de Semogyi, *Muslim World*, Vol. LIII (1963), p. 13 and *passim*.

49. Quoted by J.T. Monroe, *Islam and the Arabs in Spanish Scholarship* (Leiden, 1970), p. 233.

50. Hussain Monés, "Le role des homme de religion dans l'historie de l'Espagne musulmane jusque'à la fin du Califat", *Studia Islamica*, XX (1964), 49ff.

51. Among many others see the recent thesis in Jamīl Abū'l Naṣr, *A History of the Maghrib* (Cambridge, 1971), p. 11.

52. Monroe, *op. cit.*

53. Monés, *op. cit.*, 50 ff.

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55. Roger Idris, "Reflexions sur le Malikism sous les Umayyades d'Espagne," *Atti del Terzo Congresso di studi Arabi Islamici* (Napoli, 1967) p. 399.

56. For details see Dozy, *op. cit.*, p. 288ff.

57. See above p. 43.

58. See below pp. 128ff.

59. E.I.J. Rosenthal, *Political Thought in Medieval Islam* (Cambridge, 1962), p. 44.

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62. Ibn Sa'īd, *al-Mughrib fī ḥulā al-maghrib*, Vol. I (Cairo. Dār al-Ma'ārif, 1953), p. 57 and Vol. II, (1955), p. 109 (for the explanatory note on the authors of this work see Shauqī Ḍayf's (the editor) introduction.

63. Ibn al-Khaṭīb, *Iḥāṭa: op. cit.*, II, p. 60.

64. See for instance two of Ibn Zumruk's eulogies preserved by al-Maqqarī, *Nafḥ al-ṭīb*, Vol. VII, pp. 96-107. The following verses illustrate our point:

واسكنوا من جوار الله اعلاه   و خص انصاره الاعلين صفوته
مناقب شرفت اثنى بها الله   انصار ملته اعلام بيعته
اذ كان جدك سيد الانصار   لاغرو ان فقت الملوك سياده
والمصطفون للنصرة المختار   السابقون الاولون الى الهدى
من كل آوى النبى و من نصر   ورثت هذا الفخر يا ملك الهدى
فليتل وحى الله فيوم واليسر   من شاء يعرف فخرهم و كمالهم
بسيوفهم دين الاله قد انتصر   ابناؤهم ابناء نصر بعدهم

65. Ibn Sa'īd, as quoted in *Nafḥ al-ṭīb*, Vol. I, p. 206.

66. See for instance the *Ẓahīr* of Qāḍī Ibn 'Āṣim for his appointment as Qāḍī. This *Ẓahīr* is preserved by al-Maqqarī, *Nafḥ al-ṭīb*, Vol. VIII, pp. 262-268.

67. 'Inān, *Nihāyat al-andalus*, pp. 426f.

68. Aḥmad Bābā, *Nayl al-ibtihāj*, (Cairo: 'Abbās b. 'Abd al-Salām, 1351 A.H.) p. 282.

69. *Al-Iḥāṭa, op. cit.*, Vol. I, p. 71.

70. Al-Maqqarī, quotes Ibn Sa'īd saying that the inspector of the mraket, on his mount, passed through the market along with his assistants. A balance was carried by one of his assistants in which the bread was weighed, as its weight and price were fixed. A small child or a 'charming' girl was sent to the market to buy the bread, which was then weighed and inspected. The same process was followed for meat and other merchandise. For details see *Nafḥ al-ṭīb*, Vol. I, pp. 203ff.

31. This *Zahīr* is mentioned by Ibn al-Khaṭīb in his *al-Iḥāṭa* in those parts which still remain in MS. preserved in the historical section of Gayangos Collection. We are quoting it here from the excerpts in an article by Muḥammad Kamāl Shabāna' "Shuyūkh ghuzāt al-maghāriba fī andalus kamā arrakha lahum Ibn al-Khaṭīb fī *al-Iḥāṭa*" in *al-Baḥth al-'ilmī*, (December-January, 1968), pp. 134-136.

32. *Ibid.*, 135f.

33. *Ibid.*, pp. 125-126.

34. The details are given by Ibn al-Khaṭīb, *Kitāb a'māl al-a'lām*, pp. 296-298.

35. Ibn al-Khaṭīb, *Al-Iḥāṭa*, Vol. II, p. 20.

36. For details see the notice of Muḥammad al-Ghanī Billāh in Ibn al-Khaṭīb, *al-Iḥāṭa*, Vol. II, pp. 48-59.

37. As quoted by Maqqarī, *Nafḥ al-ṭīb*, Vol. I, p. 202.

38. 'Inān, *Nihāyat al-andalus*, op. cit., 426.

39. *Ibid.*

40. Abū'l Ḥasan al-Nubāhī, *al-Marqabat al-'ulyā...*, p. 49.

41. See below pp. 51 ff.

42. Ibn Khaldūn, *op. cit.*, p. 694.

43. Ibn al-Khaṭīb, *A'māl...* pp. 78-79.

44. *Al-Katībat al-kāmina fī man laqaynāhu bi al-andalus min shu'arā' al-mī'at al-thāmina*, ed. Iḥsān 'Abbās, (Bayrūt: Dār al-Thaqāfa, 1963) pp. 146-152.

45. See above p. 39 and p. 84 n. 15.

46. See for instance: R. Dozy, *Histoire des musulmans d'Espagne*, Vol. I (Leiden: 1932), pp. 286ff; and Lévi-Provençal, *Histoire de l'Espagne musulmane*, Vol. I (Paris, 1950) pp. 149ff.

47. Ibn Khaldūn, *Muqaddima* (Cairo, 1320 A.H.), p. 425.

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والمصطفون لنصرة المختار   السابقون الاولون الى الهدى
من كل آوى النبى ومن نصر   ورثت هذا الفخر يا ملك الهدى
فليتل وحى الله فيهم واليسر   من شاء يعرف فخرهم و كمالهم
بسيوفهم دين الاله قد انتصر   ابناؤهم ابناء نصر بعدهم

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67. 'Inān, *Nihāyat al-andalus*, pp. 426f.

68. Aḥmad Bābā, *Nayl al-ibtihāj*, (Cairo: 'Abbās b. 'Abd al-Salām, 1351 A.H.) p. 282.

69. *Al-Iḥāṭa*, op. cit., Vol. I, p. 71.

70. Al-Maqqarī, quotes Ibn Sa'id saying that the inspector of the mraket, on his mount, passed through the market along with his assistants. A balance was carried by one of his assistants in which the bread was weighed, as its weight and price were fixed. A small child or a 'charming' girl was sent to the market to buy the bread, which was then weighed and inspected. The same process was followed for meat and other merchandise. For details see *Nafḥ al-ṭīb.*, Vol. I, pp. 203ff.

71. The rules of Islamic law in this respect were based on the Qur'ānic verses prohibiting usury and speculative transactions. For instance the verse: "O ye who believe! Devour not usury, doubling and quadrupling (the sum lent). Observe your duty to Allāh, that ye may be successful" (3:129), and "O ye who believe! Strong drink and games of chance and idols and divining arrows are only an infamy of Satan's handiwork, leave it aside in order that ye may succeed."(5:90).

72. See Abu'l Ḥasan 'Ali b. Yūsuf al-Ḥakīm, al-Dawḥat al-mushtabika fī ḍawābiṭ dār al-sikka, Ed. Ḥusayn Mūnis (Madrid, 1960), pp. 52-53.

73. For instance see the notice of Qāḍī Ibn 'Ayyāsh in Nubāhī, Al-marqabat al-'ulyā, pp. 20-21.

74. This point is explained by R. Levy, The Social Structure of Islam (Cambridge, 1957), pp. 291-293.

76. Although it is difficult to find specific evidence on the number and quality of these tracts of land, yet, the large number of fatwās requested about aḥbās which were attached to mosques and the fuqahā''s complaints when these lands were made subject to tax are indicative of the point we are making. For such fatāwā see Wansharīsī, al-Mi'yār al-mughrib (Fas, 1314-15 A.H.), Vol. VII, 68ff.

76. Vide Nafḥ al-ṭīb, Vol. I, p. 205.

77. Ibn Khaldūn, Muqaddima, op. cit., p. 407f.

78. Shāṭibī, al-Muwāfaqāt (Cairo: Raḥmāniya, n.d.), Vol. I, p. 97.

79. Paul Nwiya, Ibn 'Abbad de Ronda (Beyrouth, 1961), p. XXVII, mentions 'Ābilī, Ibn 'Abd al-Salām and Qarāfī among those who opposed the establishment of madāris. They regarded such institutions as bid'a.

80. Lévi-Provençal, Inscriptions Arabes d'Espagne (Leyde: Brill, 1931), p. 158ff, particularly see n. 1, where Ibn al-Khaṭīb is quoted calling this madrasa as bikr al-madāris.

81. Nwiya, op. cit.

82. Nafḥ al-ṭīb, Vol. I, p. 205.

83. Muḥsin Mahdī, Ibn Khaldūn's Philosophy of History, p. 35, n. 2.

84. See Nubāhī, op. cit. p. 201.

85. Qāḍī 'Iyāḍ (d. 544 A.H.) and Ibn Ḥirzihim issued a fatwā giving orders to burn Ghazālī's Iḥyā 'ulūm al-dīn. See below n. 103, 104.

86. Nayl, p. 261.

87. Iḥsān 'Abbās, Introduction to Ibn al-Khaṭīb's al-Katibat al-kāmina, p. 10f.

88. Nubāhī, op. cit., p. 201.

89. Ibid.

90. Ibid., p. 202.

91. Nafḥ al-ṭīb, Vol. VII, p. 49ff.

92. Among them the following has been edited and studied by Abdelmagid Turki, in his article "Lisān al-Dīn Ibn al-Hatīb (713-76/1313-74), Juriste d'aprés son oeuvre

inédite, Mutla al-Tariqa fī Damm al-Watiqa [Muthlā al-ṭarīqa fī dhamm al-wathīqa], Arabica, Vol. XVI (1969), pp. 155-211 and 280-311.

93. E. Sharqāwi, Religion and Philosophy in the Thought of Fakhr al-Dīn al-Rāzī (Unpublished thesis, McGill University, 1970), pp. 285f.

94. Brockelmann, G.A.L. I, p. 667 and SI, 921.

95. Makhlūf, Shajarat al-nūr al-zakiyya, Vol. I (Cairo, 1930-31), pp. 167-168.

96. Ibid., p. 218.

97. Muḥsin Mahdī, op. cit., p. 30 n. 3.

98. Ibid., p. 35, n. 2.

99. P. Nwiya, op. cit., p. XVIII.

100. J. Spencer Trimingham, The Sufi Orders in Islam, (Oxford, 1971), p. 46.

101. Brockelmann, G.A.L. SI, p. 830. Margaret Smith, Al-Ghazali, The Mystic (London: Luzac, 1944), in Chapter XIII mentions other critics of al-Ghazālī and omits Ṭurṭūshī whose refutation of iḥyā is one of the most significant contributions towards a criticism of al-Ghazālī. The reason why she omitted this work is probably her statement about the co-operation between al-Ghazālī and al-Ṭurṭū-shī. She said, "..al-Ghazālī in consultation with Abū Bakr Ṭurṭūshī, a well-known authority on law and tradition (d. 520/1126), addressed letters of advice to Yūsuf (bin Tāshufīn), urging him to govern with justice…' (p. 21). She made this statement on the authority of De Slane's translation of Ibn Khaldūn's statement in this connection. The original statement by Ibn Khaldūn, however, as we quote below, does not imply a co-operation between al-Ghazālī and al-Ṭurṭūshī. This misunderstanding probably led her to suppose the above-mentioned fact. Ibn Khaldūn's sentences are as follows:

وخاطبه الامام الغزالى والقاضى ابوبكر الطرطوشى بعضانه على العدل والتمسك بالخير

(Kitāb al-'ibar, op. cit., Vol. VI, p. 386).

De Slane's translation [Histoire des Berbéres, Vol. II, (Paris, 1972), p. 82] is as follows: "L'imam El-Ghazzali et le cadi Abou Bekr-et-Tertouchi lui addresserent aussi des lettres de conseils et l'engagérent de la manière la plus pressante à gouverner avec justice…"

102. A.M.M. Mackeen, "The Early History of Ṣūfism in the Maghrib prior to Al-Shādhilī (d. 650/1256)" in the Journal of the American Oriental Society, Vol. 91, 1971, p. 402.

103. Muḥammad al-Zabīdī al-Murtaḍā, Itḥāf sādat al-muttaqin, commentary on Iḥyā' 'ulūm al-dīn, written in 1193 A.H. (Cairo, 1893), Introduction, Vol. I, p. 10.

104. Ibid., p. 27.

105. Ambroxio Huici Miranda, "The Iberian Peninsula and Sicily" in The Cambridge History of Islam, Vol. II (Cambridge: Cambridge University Press, 1970), p. 427.

106. Arnaldez, "Ibn Rushd", E.I. new edition, p. 910, referring to D.B. Macdonald's view on this point.

107. George Marçais, "Note sur les ribâts en Berbérie" in "*Mélanges René Basset*, Vol. II, (Paris, 1925), p. 399. Particularly, see his article "Ribāṭ" *E.I.* (1st ed.), Vol. III, pp. 1150-1152.

108. H.A.R. Gibb, Introduction to *Ibn Baṭṭūṭa: Travels in Asia and Africa* 1325-1354, (London, 1963), p. 34.

109. Ibn Baṭṭūṭa, *Tuḥfat al-nuẓẓār fī gharā'ib al-amṣār wa 'ajā'ib al-asfār*, Vol. II, Ed. 'Awāmirī Bek and Jād al-Mawlā, (Cairo, 1934), p. 294.

110. 'Inān, *Nihāya*, *op. cit.*, p. 449.

111. See for instance Ibn Qabbāb's appointment to supervise a trust donated by the Sulṭān to a Zāwiya.

112. See Al-iḥāta, I, 71. See wansharisi, IX, 31-36.

113. Shihāb al-Dīn al-Qarāfī, *al-Furūq*, Vol. IV, (Cairo: Dār Iḥyā Kutub al-'Arabiya, 1346 A.H.), p. 210.

114. See below pp. 161 ff.

115. S. Trimingham, *op. cit.*, p. 50.

116. Maqqarī, *Nafḥ al-ṭib*, Vol. VII, *op. cit.*, pp. 232-249 gives long extracts from this work.

117. *Ibid.*, p. 261.

118. *Ibid.*, p. 189-90.

119. P. Nwiya, *Ibn 'Abbād de Ronda*, *op. cit.*, pp. XXXIX and XLI relates a similar chain from Ibn Qunfudh. He observes certain historical defaults in this chain, and provides a detailed criticism on this point.

120. It is curious to note that in the third patch Ibn al-'Arabī (Qāḍī Abū Bakr) and Ibn Ḥirzihim are juxtaposed with Ghazālī. Ibn Ḥirzihim, as has been pointed out above, is known for his *fatwā* against Ghazālī's *Iḥyā*, and Qāḍī Ibn 'Arabī's commentary bears a general trend of oppoition to Ṣūfism.

121. *Nafḥ al-ṭib*, Vol. VII, p. 124-125 quoting from *al-Fatḥ al-munīr*.

122. Shāṭibī's *fatwā* issued in 786 A.H., preserved by Wansharisī, *op. cit.*, Vol. XI, p. 34.

123. In the Muslim East the practice of celebrating the Prophet's birthday started earlier, but in the Muslim West, according to Salāwī, it was started by the Marini ruler, Abū Yūsuf Ya'qūb in 691 A.H., from whence it came to Andalus. (Salāwī, *al-Istiqṣā*, *op. cit.*, Vol. 3, p. 290). Ibn Khaldūn, *op. cit.*, pp. 864, 881 and 885 mentions how on three such occasions poems were recited. These celebrations lasted for a few days. Verses from the Qur'ān were recited, and animal sacrifices were offered. Cf. Maqqarī, *Azhār al-riyāḍ*, (Cairo, 1939), Vol. I, p. 245. Some fuqahā' considered this a *bid'a*, and opposed it. Shāṭibī, in a *fatwā*, refused the validity of a will which wished to dispose of one third of the property for the purpose of the Prophet's birthday celebration. Wansharisī, *op. cit*, Vol, IX, p, 181.

124. Trimingham, *op. cit.*, p. 50

125. Ibn Baṭṭūṭa, *op. cit.*, p. 294.

126. See for the description of this rural town now called Canales in Ibn al-Khaṭīb, *Khaṭrāt al-ṭayf fī rihlat al-shitā' wa'l ṣayf* in A. M. 'Abbādī, *Mushāhadāt*, *op. cit.*, p. 33 and 'Abbādī's note no 4.

127. See Wansharisī, Vol. IX, p. 31.

128. *Ibid.*, pp. 34-36.

129. The best contemporary sources of information on the economy and geography of this period, in our opinion, are Ibn al-Khaṭīb's following two treatises: *Khaṭrāt al-ṭayf fī rihlat al-shitā' wa al-ṣayf* and *Mi'yār al-ikhtibār fī dhikr al-ma'āhid wa'l diyār* edited and published by A.M. 'Abbādī, in *Mushāhadāt Lisān al-Dīn ibn al-Khaṭīb*, *op. cit.* The above must be supplemented with the study of *fatāwā* of this period (i.e. 14th century) by Lopez Ortiz, "Fatwās granadianas de los siglos XIV y XV", *Al-Andalus*, Vol. VII (1941), pp. 73-127.

130. Lévi-Provençal, "Al-Andalus", *E.I.2*, pp. 486-492.

131. Quoted in Maqqarī, *Nafḥ al-ṭib*, Vol. I, p. 124, translation Pascual de Gayangos, *The History of the Mohammedan Dynasties in Spain*, Vol. I (Cairo: 1902), p. 17.

132. Ibn al-Khaṭīb, *al-Iḥāṭa*, Vol. I, p. 32.

133. Imamuddin, *A Political History of Spain*, p. 294.

134. Cf. Seybold, "Granada", in *E.I.* (1st edition), Vol. II, p. 176.

135. *al-Iḥātā*, *op. cit.*, I, p. 38.

136. Ibn Baṭṭūṭa, translation H.A.R. Gibb, *Ibn Baṭṭūṭa, Travels in Asia and Africa* 1325-1354, (selection) (London, 1963), p. 319.

137. 'Inān, *Nihāyat al-andalus*, p. 430. 'Inān does not indicate his source but probably he derives this information from Prescott, *History of Ferdinand and Isabella the Catholic* on which he relies for the most of his data of this period.

138. A detailed description of the reserves of the Naṣrid treasury are given by 'Abd Allāh Muḥammad b. al-Ḥaddād al-Wādī 'Āshī as quoted by Muḥammad Kamāl Shabāna, "al-Ḥālat al-iqtiṣādiyya bi'l-andalus khilāl al-qarn al-thāmin al-hijrī" in *al-Baḥth al-'ilmī*, Rabāṭ, Vol. III (August, 1966), p. 137. Unfortunately, Shabāna's reference to the original source is not clear.

139. For this information we have relied on Lopez Ortiz's above-mentioned study. See particularly pp. 95-97.

140. *Nafḥ al-ṭib*, Vol. I, p. 202.

141. Lopez Ortiz, *op. cit.*, p. 96.

142. Imamuddin, *op. cit.*, p. 294.

143. Lopez Ortiz. *op. cit.*, p. 95.

144. Antonio Vives, "Indicacion del Valor en las Mondedas Arabigo - Espanolas", in D.E. Saavedra. (Ed.) *Homenaje à D. Fransisco Codera*, (Zaragoza, 1904), p. 522. Also, see D.F. Codera y Zaidin, *Tratado de Numismatica Arabi-Espanola*, (Madrid, 1879), p. 231.

145. See H.W. Hazard's analysis of the metrology of the coins of North Africa (which partly includes Spain as well) in *The Numismatic History of Late Medieval North*

Africa, (American Numismatics Society, New York, 1952), pp. 48-49. Hazard says that Zīrid dīnār was 4.11 - 4.35 grams in weight and 22-24 milimeters in diameter. The Muwaḥḥidūn introduced double dīnārs averaging 4.55 grams and 27-32 milimeters, whereas their normal dīnār averaged 2.27 grams and 19-22 milimeters. The Naṣrid dīnār seems to have been better than its predecessors. Two specimens registered in M.H. Lavoix, *Catalogue des monnaies musulmanes de la Bibliotheque Nationale*, Vol. V (Paris, 1891), pp. 328-329, provide the following data:

(1) Catalogue no: 780: Yūsuf b. Muḥammad (1333-1354), gold; weight 4.65 grams, diametr 31 milimeters.

(2) Catalogue no: 781: Muhammad V al-Ghanī Billāh (1354-1359 - 1362- 1391), gold: weight 4.70 grams; diameter 32 milimeters.

146. Luis Seco de Lucena, in *Documentos Arábigo-Granadinos*, Instituto des Estudios Islamicos, (Madrid, 1961), studied a number of documents of a judicial nature belonging to fifteenth century Granada. In his analysis he found very interesting data bearing on the social and economic conditions of that period. We have derived our information from Lucena's analysis of currency in these documents as given by him on pp. XLVI-XLVIII.

147. Most probably Lucena is here referring to Antonio Vives, *op. cit.*, and Fransisco Codera, *op. cit.*

148. See Lopez Ortiz, *op. cit.*, p. 94f.

149. See such statements by early historians and geographers as quoted extensively by Maqqarī, *Nafḥ al-ṭīb*, Vol. I, pp. 124-194, but particularly pp. 136-138, where the description by Rāzī, the geographer, is quoted at length.

150. "Andalus" *E.I.²*, p. 491.

151. Lopez Ortiz, *op. cit.*, pp. 97, 106f.

152. Ibid., p. 106ff.

153. *Ibid.*

154. *Ibid.*, p. 109.

155. *Ibid.*, p. 103.

156. In the days of Muḥammad V, the irrigation system was further improved. See Imamuddin, *op. cit.*, p. 294.

157. On this point we are relying on E.F. Heckscher, "Mercantilism" in H.W. Spiegel, *The Development of Economic Thought* (New York: Science Books, 1966), pp. 32-41.

158. Lopez Ortiz, *op. cit.*, p. 114.

159. *Ibid.*, pp. 114ff.

160. *Ibid.*, p. 110.

161. Ibn al-Khaṭīb, *al-Iḥāṭa*, Vol. I, p. 15.

162. Louis Bertrand and Charles Petrie, *The History of Spain*, trans. W.B. Wells (New York, 1934), p. 204.

163. Ibn al-Khaṭīb, *Mufākharāt mālaqa wa salā*, op. cit., pp. 77-90.

164. *Nafḥ al-ṭīb*, op. cit., Vol. I, 154.

165. S.M. Bastieva, "Ibn Khaldūn et son milieu social", *Atti del Terzo Congresso*, op. cit., p. 138.

166. 'Inān, *op. cit.*, p. 429.

167. *Ibid.*, p. 428.

168. See above p. 40.

169. See above p. 44.

170. Bastieva, p. 138.

171. Lopez Ortiz, *op. cit.*, p. 95.

172. 'Inān, *op. cit.*, p. 428.

173. *Ibid.*, p. 97.

174. *Ibid.*, p. 100.

175. *Ibid.*, p. 110.

176. Lopez Ortiz, *op. cit.*, p. 101.

177. *Ibid.*, p. 98.

178. *Ibid.*, p. 94f.

179. Dozy, *Supplement aux dictionnaires Arabes*, Vol. II (Paris, 1967), p. 275.

180. Al-Qur'ān 90: 12-13: "What would make thee know what is an uphill task? The freeing of a slave or a captive."

181. Lane, *Arabic English Lexicon*, (London: 1874), Vol. 6, p. 2431.

182. E.N. Van Kleffens, *Hispanic Law until the End of the Middle Ages* (Edingburgh. 1968). p. 105, no. 3, refers to the Hispanic legal term "alfaqueques" meaning the administrator of the property of the prisoners of war.

183. L. Bertrand, *The History of Spain*, p. 200. This observation is supported by Ibn Buṭṭūṭa's narration of such an attempt by the notables in Malaga (below p. 75). Ibn al-Khaṭīb also praised the people of Malaga for the purchase of freedom of such prisoners. See *Mi'yār al-ikhtibār, op. cit.*, p. 78.

184. Ibn Baṭṭūṭa, *Tuḥfat al-nuẓẓār*...op. cit., pp. 290-292.

185. See al-Wansharisī, *op. cit.*, Vol. II, p. 127.

186. See above note 182.

187. Lopez Ortiz, *op. cit.*, p. 95.

188. *Ibid.*, p. 95.

189. See p. 49 ff.

180. See p. 121 ff.

191. See p. 52.

192. See p. 127. the story of the litigant in case of *ḥabs*.

193. Shihāb al-Dīn al-Qarāfī, *Al-Iḥkām fī tamyīz al-fatāwā 'an al-aḥkām.* (Ed.) 'Abd al- Fattāḥ Abū Ghadda. (Ḥalab: Maṭbū'at Islāmiyya, 1967).

194. *Ibid.,* p. 18.

195. *Ibid.,* p. 20.

196. *Ibid.,* pp. 22-23.

197. *Ibid.,* p. 32.

198. This conclusion is drawn from the following sources: Lopez Ortiz, *Fatawa Granadinas*...op. cit., p. 91; Wansharīsī, *al-Mi'yār*...op. cit., Vol. II, p. 166; Vol. V, 186f.

199. See p. 209ff.

200. *Nayl,* p. 265.

201. *Shajara,* p. 230.

202. This treatise was studied by Abdelmagid Turki see above note 92.

203. Ibid., pp. 280, 284 and *passim.*

204. E.N. Van Kleffens, *Hispanic Law until the end of the Middle Ages,* p. 124.

205. *Ibid.,* p. 154.

206. *Ibid.,* p. 74.

207. *Ibid.,* p. 77.

208. *Ibid.,* p. 79.

209. *Ibid.,* p. 145.

210. *Ibid.,* p. 146.

211. *Ibid.,* p. 147.

212. *Ibid.,* pp. 176-78.

213. *Ibid.*

214. Henry Lacerte, *The Nature of Canon Law According to Suarez* (Ottawa: University of Ottawa Press, 1964), p. 3.

215. *Ibid.,* pp. 20ff.

LIFE
AND WORKS

This chapter attempts to reconstruct a sketch of certain significant events in Shāṭibī's life which, as we shall see, in the absence of sufficient data about his life, are very helpful in an understanding of the reasons for Shāṭibī's interest in the philosophy of Islamic law.

When writing a biography of Shāṭibī, one's attention is drawn first of all to the scarcity of data about his life, although he was one of the most prominent Mālikī jurists. Here an answer to the question of why there should be so little information on so important a man is attempted. This is followed by a discussion of the information available about his life, his career, his disputations with other scholars, and his works.

SOURCES

To our knowledge Aḥmad Bābā's [1] (d. 1036/1626) *Nayl al-ibtihāj* [2] contains the first biographical notice on Shāṭibī.

Among his contemporaries Lisān al-Dīn Ibn al-Khaṭīb (d. 776/1374) and Ibn Khaldūn (d. 784/1382) wrote at length about Granada and scholars living there in this period. Although it would be a reasonable assumption that both Ibn al-Khaṭīb and Ibn Khaldūn would have known Shāṭibī, he goes unnoticed in their accounts. Ibn al-Khaṭīb and Shāṭibī had common teachers [3] (and one of the sources even describes Ibn al-Khaṭīb as a pupil of Shāṭibī) [4], and common friends. [5] Ibn Khaldūn wrote a treatise, [6] in response to Shāṭibī's query addressed to the scholars in the West. Nevertheless, neither of these important writers makes mention of Shāṭibī.

A possible explanation for this omission might be that Shāṭibī had not yet written his monumental work, *al-Muwāfaqāt*, when the other two composed their works. This is quite possible because Shāṭibī refers to Ibn al-Khaṭīb's *al-Iḥāṭa* in his work (though without mentioning his name). [7] This reference means that Shāṭibī's work must have been written after the completion of *al-Iḥāṭa*, as we believe after 771/1369. [8] This fact also explains Ibn Khaldūn's omission of Shāṭibī's name. Ibn Khaldūn visited Granada in 764-65/1362-63 [9] while Shāṭibī had not yet become a sufficiently prominent figure to attract his notice.

Among the authors of the *Ṭabaqāt* of the Mālikīs, [10] Ibn Farḥūn (d. 799/1396), author of *al-Dībāj al-mudhahhab* was Shāṭibī's contemporary, but did not mention him. Since it cannot be established whether Ibn Farḥūn was acquainted with Shāṭibī we cannot be certain that this exclusion of Shāṭibī from *al-Dībāj* was deliberate. One possible explanation could, however, be suggested.

Ibn Farḥūn was born in Medina and, except for a few journeys to the West, [11] he passed most of his life in the East of the Muslim world. His knowledge of the Muslim West, though generally thorough, was based on secondary sources. [12] Besides, he had already completed *al-Dībāj* in 761 A.H. [13] As was previously suggested, it is most probable that

Shāṭibī had not yet written his *al-Muwāfaqāt*. Otherwise, Ibn Farḥūn could not possibly have overlooked him. The basis of our conjecture is Ibn Farḥūn's insistence on including in his *al-Dībāj* only the names of those who had been authors of some books. [14]

Badr al-Dīn al-Qarāfī (d. 1008/1599) is known to be the next writer of *Ṭabaqāt* after Ibn Farḥūn. [15] His *Tawshīḥ al-dībāj* [16] is the complement of *al-Dībāj*. He too does not mention Shāṭibī. His reasons seem to be the same as those we suggested in the case of Ibn Farḥūn. In a number of places, as Aḥmad Bābā points out in strong language, [17] Qarāfī, lacking sufficient knowledge of the West, confuses the names and *kunya*s of many well-known scholars.

Aḥmad Bābā is not only the first biographer but also a primary source in this respect. Almost all of the later scholars who have taken notice of Shāṭibī belong to the twentieth century, and they depend largely on Aḥmad Bābā's notice. [18] Aḥmad Bābā treats of Shāṭibī in *Nayl al-ibtihāj* as well as in *Kifāyat al-muḥtāj* [19] which supplemented the former. *Nayl* was written during Aḥmad Bābā's internment period in Morocco, where he was taken as a prisoner after the invasion of the Sudan by the Sulṭān of Morocco in 1591. There, Aḥmad Bābā, though he was without his personal collection of sources, was able to use the books in the possession of Moroccan scholars and in the libraries. [20]

The reasons why Aḥmad Bābā mentioned Shāṭibī while his predecessors did not, could be the following:

First, as a general reason, the *Nayl* was meant to be a supplement to *al-Dībāj*; "complementing what was missing in it and supplementing it with (the mention of) those eminent *a'imma* who came after him". [21]

Second, he was certainly better informed about the learned tradition in the Muslim West [22] than Qarāfī or Ibn Farḥūn, and hence he was capable of making up the deficiencies of *al-Dībāj*.

Third, he felt this deficiency more strongly because for a long time there was no other work on the subject but that of Ibn Farḥūn, [23] and this too suffered from grave faults.

Apart from such general considerations, Aḥmad Bābā's high regard for Shāṭibī may be suggested as a specific reason why Aḥmad Bābā mentioned Shāṭibī. This esteem is reflected in the honorific titles with which

he mentions Shāṭibī.[24]   His regard for Shāṭibī further manifests itself
when he disputes Abū Ḥāmid Makkī's claim for his master Ibn 'Arafa
(d. 803 A.H.)[25] as "being peerless in *taḥqīq* (the skill of applying general
principles of (Mālikī) school to particular cases)".[26]   Aḥmad Bābā men-
tions Shāṭibī as one example of scholars who were in no way lesser than
Ibn 'Arafa,[27]   Elsewhere he says,

> Among the people of the ninth (/sixteenth) century there are al-'Aqbānī and
> others who assert their attainment of the status of *ijtihād*, while Imām al-
> Shāṭibī and Ḥafīd Ibn Marzūq (d. 842/1438) declined it for themselves. It is
> certain that both of them had more profound knowledge (of *sharī'a*) and
> thus (were) more deserving of this status than those who claimed it.[28]

We have dwelt long on the question of why Aḥmad Bābā first took
notice of Shāṭibī while others did not.   Let us now discuss Aḥmad Bābā's
sources for his biography of Shāṭibī.

Beside the sources mentioned towards the end of the *Nayl*, the most
significant among them being al-Wansharīsī,[29] Aḥmad Bābā used Shāṭibī's
own work *al-'Ifādāt wa'l-inshādāt*.[30]   This work seems to consist of
Shāṭibī's class notes and of anecdotes narrated by his teachers. The
extracts from this work, as quoted by al-Maqqarī[31] in his *Nafḥ al-ṭīb*
and by Aḥmad Bābā in the *Nayl*, indicate that the *Ifādāt* must contain con-
siderable information about Shāṭibī's teachers and himself. If that be so,
Aḥmad Bābā's information about Shāṭibī may be taken as first hand.

As to our information in the following pages, it is based mainly on
the *Nayl*.   We have used the extracts of the *Ifādāt* as quoted in the *Nayl*
and *Nafḥ*.   We have also used Shāṭibī's *al-Muwāfaqāt* and *al-I'tiṣām*.   The
preface of *al-I'tiṣām* explains the circumstances that led to Shāṭibī's
thought on *sharī'a* passing through various stages and how he was accused
of heresy.[32]   *Al-Muwāfaqāt* refers to the discussions[33] in which Shāṭibī
became involved with other scholars.

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SHĀṬIBĪ'S LIFE

His full name is reported as Abū Isḥāq Ibrāhīm b. Mūsā b. Mu-
ḥammad al-Lakhmī al-Shāṭibī.   We know virtually nothing about his
family or his early life.   The most that we can learn by deduction from his
nisba is that he belonged to the Lakhmī Arab tribe.   We know also that
his immediate family came from Shāṭiba (Xativa or Jativa).   This latter
nisba has misled some scholars to maintain that Shāṭibī was born or lived
in Shāṭiba before coming to Granada.[34]   This is not possible because
Shāṭiba was taken by the Christians a few decades ago, and , according to
the chronicles, the last Muslims were driven out of Shāṭiba in 645/1247.[35]

Shāṭibī grew up in Granada and acquired his entire training in this
city which was the capital of the Naṣrī Kingdom.   Shāṭibī's youth coin-
cided with the reign of Sulṭān Muḥammad V al-Ghanī Billāh, a glorious
period for Granada.[36]   The city had become a centre of attraction for
scholars from all parts of North Africa.   It is not necessary to list here all
the scholars who visited Granada or who were attached to the Naṣrī
court, names such as Ibn Khaldūn and Ibn al-Khaṭīb being sufficient to
illustrate our point.

EDUCATION

We do not know when and what subjects Shāṭibī studied for his
training.   What follows is an account of some of his teachers, from which
an idea of his training may be drawn.   It appears that, according to nor-
mal practice, Shāṭibī started his training with studies in Arabic language,
grammar and literature.   In these subjects, he benefited from two masters.
He began his studies with Abū 'Abd Allāh Muḥammad b. 'Alī al-Fakh-
khār al-Ilbīrī[37] who was known as the master of grammarians (Shaykh
al-nuḥāt) in Andalus.   Shāṭibī stayed with him until the latter's death
in 754/1353.   Shāṭibī's notes about al-Fakhkhār in the *Ifādāt* illustrate
clearly that he received a thorough training in matters pertaining to the
Arabic language.[38]

His second teacher in the Arabic language was Abū'l Qāsim al-Sharīf
al-Sabtī (760/1358), author of the well-known commentary on the *Maqṣūra*

of Ḥāzim.[39]   He was called "The Bearer of the Standard of Rhetoric".[40]
He was chief Qāḍī in Granada in 760/1358.

The famous Andalusian *faqīh* Abū Saʿīd ibn Lubb began his lectures
in the Madrasa Naṣriyya in 754/1353.[41] Most probably he succeeded al-
Fakhkhār on the latter's death.   Ibn Lubb was well versed in *fiqh* and was
recognized for his "rank of *ikhtiyār* (decision by preference) in respect to
fatwā"[42]   Shāṭibī's training in *fiqh* was almost entirely completed with
Ibn Lubb.   Shāṭibī owes much to this man, but he entered into con-
troversy on a number of issues with Ibn Lubb also.[43]

We need not recount the names of all of Shāṭibī's teachers;[44] it
seems he benefited from all well-known scholars in Granada as well as
those who visited Granada on diplomatic missions.   Among such scholars
mention must be made of Abū ʿAbd Allāh al-Maqqarī[45] who came to
Granada in 757/1356 on a diplomatic mission sent by the Marīnī Sulṭān
Abū ʿInān.[46]   Maqqarī had an eventful career.   Sulṭān Abū ʿInān chose
him as his chief Qāḍī, but soon Qāḍī Abū ʿAbd Allāh al-Fishtālī succeeded
in having him deposed.   Maqqarī was sent to Granada from where he
refused to return to Fez.   The Naṣrī Sulṭān arrested him and sent him back.
Abū'l Qāsim al-Sabtī and Abū'l Barakāt Ibn al-Ḥājj al-Balfīqī, qāḍīs of
Granada, followed him to Fez to secure his release.   Nevertheless, Maqqarī
was tried by al-Fishtālī and was convicted.[47]

Maqqarī's academic tastes were versatile.   He is the author of a
book on Arabic grammar.   He was known as holding the rank of "*muḥaq-
qiq*"[48] (expert on the application of general principles of the [Mālikī]
school to particular cases).

Maqqarī seems to have acquainted Shāṭibī with Rāzism in *uṣūl
al-fiqh*.   He started to compose an abridgement of Fakhr al-Dīn al-Rāzī's
(606/1209) *al-Muḥaṣṣal*.[49]   He is also the author of a commentary on
the *Mukhtaṣar* of Ibn Ḥājib who introduced Rāzism into Mālikī *uṣūl al-fiqh*.

Maqqarī is also responsible for initiating Shāṭibī into ṣūfism — a
special *Silsila* of which we have spoken elsewhere.[50]   Maqqarī is known
for his book *al-Ḥaqāʾiq wa'l-raqāʾiq fī al-taṣawwuf*.[51]

Mention must also be made of two of Shāṭibī's teachers who intro-
duced him to *falsafa* and *kalām* and other sciences which are known in the
Islamic classification of the sciences as the rational sciences (*al-ʿulūm al-
ʿaqliyya*) as opposed to the traditional sciences (*al-ʿulūm al-naqliyya*).

Abū ʿAlī Manṣūr al-Zawāwī[52] came to Granada in 753/1352.
Ibn al-Khaṭīb praises him highly for his scholarship in traditional as well
as rational sciences.   He appears to have run into frequent controversies
with jurists in Granada.   He was accused of various things.   Finally in
765/1363, he was expelled from the Andalus.[53]

Shāṭibī mentions Zawāwī quoting his teacher, Ibn Musfir, saying that
in his commentary on the Qurʾān, Rāzī relied on four books, all written
by the Muʿtazilīs; in *uṣūl al-dīn* Abū'l Ḥusayn's *Kitāb al-dalāʾil*, in *uṣūl
al-fiqh* his *al-Muʿtamad*, in *uṣūl al-tafsīr* on Qāḍī ʿAbd al-Jabbār's *Kitāb
al-Tafsīr* (?) and in *uṣūl al-ʿArabiyya* and *bayān* on Zamakhsharī's *Kash-
shāf*.[54]   This comment seems to imply that Zawāwī and his teacher saw
in Rāzī a continuation of Muʿtazilī *Kalām*.

Al-Sharīf al-Tilimsānī (d. 771/1369) also seems to have been critical
of Rāzism.   He studied with ʾĀbilī and specialized in the rational sciences.
Ibn Khaldūn mentions that Tilimsānī secretly taught Ibn ʿAbd al-Salām
the books of Ibn Sīnā and Ibn Rushd.[55]   Tilimsānī was well-versed in
both the traditional and the rational sciences.   Contemporary scholars
laid stress on his attainment of the rank of *mujtahid*.[56] Ibn ʿArafa lamented
Tilimsānī's death as the death of the rational sciences.[57]

From the above account of his notable teachers it may be concluded
that Shāṭibī's training must have been quite thorough in both the traditional
and the rational sciences.   His main interests, however, as we shall see
from the list of his works, were concentrated upon the Arabic language and
uṣūl al-fiqh, particularly the latter.

SHĀṬIBĪ'S INTEREST IN UṢŪL AL-FIQH

Fiqh was a very profitable and hence popular subject, but interest
in *uṣūl al-fiqh* was rare in the Andalus.[58]   What induced Shāṭibī to interest
himself in *uṣūl al-fiqh* was his feeling that the weakness of *fiqh* in meeting
the challenge of social change was due largely to its methodological and
philosophical inadequacy.   This weakness struck Shāṭibī very early in his
training years.   He says:

> Ever since the curiosity of my intellect was aroused for understanding
> (things) and ever since my anxiety was directed towards knowledge, I
> always looked into its [the *sharīʿa*'s] reasons and legalities; its roots and its
> branches.   As far as the time and my ability permitted I did not fall

short of any science among the sciences, nor did I single one out of the others.

I exploited my natural capacity or rather plunged into this tumultuous sea... so much so that I feared to destroy myself in its depths... until God showed His kindness to me and clarified for me the meanings of *Shari'a* which had been beyond my reckoning...

From here I felt strong enough to walk on the path as long as God made it easier for me. I started with the principles of religion (*usūl al-dīn*) in theory and in practice and the branches, based on these problems. (It was) during this period (that) it became clear to me what were the *bida'* and what was lawful and what was not. Comparing and collating this with the principles of religion and law (*fiqh*), I urged myself to accompany the group whom the Prophet had called *al-sawād al-a'ẓam* (the majority).[59]

One of the most perplexing problems for Shāṭibī was the diversity of opinions among scholars on various matters. Use of the principle of *murā'āt al-khilāf* made the problem even more complex. This principle, as we shall see subsequently,[60] was employed to honour differences of opinion by treating them all as equally valid. Because of this attitude, diversity of opinions was proudly preserved even from the earliest days of Mālikī *fiqh*. Shāṭibī himslef recalled that the diversity in the statements of Mālik and his companions used to occupy his mind frequently.[61]

Studying with Abū Sa'īd b. Lubb, Shāṭibī faced such perplexities very often. He states:

I once visited our master, Abū Sa'īd b. Lubb, the *mushāwir*, along with my friends... He said, "I wish to inform you about some of the basic principles on which I relied in such and such a *fatwā*, and (to explain) why I intended for leniency in that". We knew about his *fatwā*... We disputed with him on his answer... He said, "I want to tell you a useful rule in issuing a *fatwā*. This rule is authentically known (as practiced) by the scholars. The rule is not to be hard on the one who came asking for a *fatwā*." Before this meeting various aspects in the statements of Mālik and his companions used to confuse me. But now God cleared my mind with the light of this discourse.[62]

This satisfaction, however, did not last long. Shāṭibī's indulgence in the problem of *murā'āt al-khilāf* shows that Ibn Lubb's clarification was not satisfactory. Shāṭibī felt that the body of the law was without spirit, its formalism would remain devoid of reality unless the real nature of the legal theory was investigated.[63] Shāṭibī's works were dedicated to such an investigation.

SHĀṬIBĪ'S CAREER

We do not find any allusion to Shāṭibī's career or to his profession. Three conjectures, however, can be made. First, in Shāṭibī's account of the accusations brought by people against himself, on one occasion it can be deduced that he was an *imām* and also a *khaṭīb* in a certain mosque. During his period of trial, it can be assumed, he was dismissed from these posts.[64]

The second conjecture can be made on the basis of the *fatwās* asked from him, that he was a *muftī*. Since he is never called *al-mushāwir*, it is difficult to maintain if he was officially appointed to this office.

He, however, had a number of disciples. From this, a third conjecture can be made, that he taught in the *madrasa* of Gharnāṭa.

Among his disciples, Ibn 'Āṣim is noteworthy. He became the chief *qāḍī* of Granada. He is known for his *Tuḥfat al-ḥukkām*, a compendium of *fiqhī* rules compiled for *qāḍīs*. He also wrote an abridgement of Shāṭibī's *al-Muwāfaqāt*.[65]

HIS DEATH

Shāṭibī died on eighth of Sha'bān in 790/1388.[66]

SHĀṬIBĪ ACCUSED OF HERESY

Sometime during his career Shāṭibī was accused of introducing innovations (*bida'*). The exact date of this period of trial cannot be known. The inquisitive mind of Shāṭibī must have led him to discussions and controversies with other *fuqahā'*. Most probably the period of trial occurred during the time he was writing his book *al-Muwāfaqāt*, when he corresponded with scholars about a number of subjects.

Shāṭibī's verses in reference to this trial indicate how he felt about these accusations. He says:

O my people you put me to the ordeal (*balayta*)
    whereas an ordeal shakes violently

The one who whirls with it, until it seems to destroy him.

(You condemn me) for preventing wrong, rather than
[praising] for attaining good (*maṣlaḥa*).

May God suffice me in my reason and religion.[67]

Shāṭibī recounts the story of this ordeal in *al-I'tiṣām* in the following words:

> I had entered into some of the common professions (*khuṭaṭ*) such as *khaṭāba* (preaching) and *imāma* (leading the prayers). When I decided to straighten my path, I found myself a stranger among the majority of my contemporaries. The custom and practice had dominated their profession; the stains of the additional innovations had covered the original tradition (*sunna*)... [68]

> I wavered between two choices; one to follow the *sunna* in opposition to what people had adopted in practice. In that case I would inevitably get what an opponent to the [social] practices would get, especially when the upholders of this practice claimed that theirs was exclusively the *sunna*.... The other choice was to follow the practice in defiance of the *sunna* and the pious ancients. That would get me into deviation [from the true path] ... I decided that I would rather perish while following the *sunna* to find salvation...

> I started acting in accordance with this decision gradually in certain matters. Soon the havoc fell upon me; blame was hurled upon me.. I was accused of innovation and heresy.[69]

Shāṭibī, at this point, enumerates the following charges that were laid against him:[70]

(1) Sometimes I was accused of saying that invocations (*du'ā*) serve no purpose...That was because I did not adhere to the practice of invocations in congregational form after the ritual prayer (*ṣalāt*).

(2) I was accused of *rafḍ* (extreme Shī'ism) and of hatred against the companions... That was because I did not adhere to the practice of mentioning the names of the pious Caliphs in the *khuṭba* (Friday sermon)...

(4) I was accused of saying that I favoured rising against the *a'imma* [the ruler]...That was because I did not mention their names in the *khuṭba*.

(4) I was accused of affirming hardship in religion... That was because I adhered to the well-established tradition in duties and *fatwās*, while they ignored it and issued *fatwās* in accor-

dance with what was convenient to the enquirer... [cf. Ibn Lubb's above statement.]

(5) I was accused of enmity against the *awliyā'* of Allāh (friends of God)... That was because I opposed some of the innovating ṣūfīs who opposed the *sunna*...

Shāṭibī was accused of *bid'a* (heresy) mainly because he opposed the practices of the *fuqahā'*. Particularly, as we shall see later,[71] one of the controversial problems was that of mentioning the name of the Sultān in the *khuṭba* and praying for him towards the end of the ritual prayers. Shāṭibī called this practice a *bid'a*. His action shook the foundations of the political power of the religious élite. On this issue, it is interesting to note that he was opposed by all the qāḍīs in Spain and North Africa as well as by some dignitaries holding government offices.[72]

Shāṭibī's above account of his trial for *bid'a*, refers to the controversies that brought him into conflict with other scholars. What follows are the details of his main disputations. Here we have limited ourselves to theoretical problems.

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SHĀṬIBĪ'S DISPUTATIONS

The Granadian society had been changing rapidly and its impact on Islamic Law was quite conspicuous. As discussed in the preceding chapter, introduction of new educational system, changes in the authority pattern of Granadian jurists, permeation of *taṣawwuf* and theological philosophy in the West and many other factors had produced a wide range of changes which agitated the minds of scholars of this period. Shāṭibī took keen interest in these developments and wrote to scholars disputing their opinions and practices on certain matters and raising fundamental questions about the goals and ends of Islamic law. A few of such disputations are discussed below.

TAṢAWWUF AND FIQH

Shāṭibī was much worried not only by the fact that *taṣawwuf* comprised a number of rituals which he considered as *bid'a* but also by the fact that *taṣawwuf* was having an adverse effect upon *fiqh* and *uṣūl*. He did not oppose the *ṣūfīs* on certain matters if they followed their peculiar practices individually or as a requirement of *taṣawwuf*. What he opposed was that certain *ṣūfīs* or certain *fuqahā'* under the influence of *taṣawwuf* should suggest that these things were obligatory in a *fiqhī* sense. The following two issues became very prominent in this concern.

THE OBLIGATION OF FREEING THE SIRR

A certain scholar sent an epistle to Shāṭibī in which under the rubric, "What is obligatory for a seeker of the Hereafter to observe and do", he wrote the following:

> If a certain thing distracts someone from his prayers even for a while, he must free his inner self [*Sirr*] from this distraction by getting rid of it, even these distractions number as many as fifty thousand.[73]

Shāṭibī objected to this statement strongly. He disputed its obligatory claim. He argued that if freeing the inner self were a universal obligation, it would lead to absurdity because it demands that people

should get rid of their property and abjure their towns, villages and families since these things constitute distractions. He adds that poverty is the major source of distraction, especially if people are occupied with the worries of supporting large families.[74]

SUBMISSION TO A SHAYKH

With the introduction of *ṭarīqa*s, ṣūfism passed into a new phase. In the previous phase, more significance was attached to books on *taṣawwuf*.[75] In the new phase, however, as we have pointed out earlier in the story of Abū'l Mā'ālī, the initiation without a *shaykh* was considered forbidden.[76] Such an emphasis on submission to a *shaykh* generated a debate among the scholars.

According to Shāṭibī submission to a *shaykh* led to a belief in the superiority of the *shaykh* to all other religious leaders. It was rather a claim to religious authority which only befitted the Prophet Muḥammad.[77] According to some *ṣūfīs*, including Qushayrī, ṣūfism was nothing more than spiritual *fiqh* (*fiqh al-bāṭin*).[78] It was, therefore, questionable for Shāṭibī that one should submit oneself totally to a *shaykh* to be initiated into a discipline; the discipline could be known from books.

Shāṭibī composed a query in which he summarized the arguments of both parties and sent this to a number of scholars in North Africa. Three of the responses to this query have come down to us. Those of Ibn al-Qabbāb (d. 779/1377) and Ibn 'Abbād of Ronda (d. 792/1389) were preserved by Wansharīsī in his *al-Mi'yār al-mughrib*. They are reproduced by Paul Nwiya in *al-Rasā'il al-ṣughrā* of Ibn 'Abbād[79] and commented and elaborated in his well-known work *Ibn 'Abbād de Ronda*.[80] The third answer was written by Ibn Khaldūn in *Shifā' al-sā'il li tahdhīb al-masā'il*, available in two editions by Ṭāvīt Ṭanjī[81] and by Khalifé.[82]

Ibn 'Abbād maintained that, "on the whole, the (submission to a) *shaykh* is an essential fact in the journey on the path of *taṣawwuf*; no one can deny that".[83] He, however, distinguished between two kinds of *shaykhs*: Shaykh al-tarbiya (educator) and Shaykh al-ta'līm (instructor). The former is not essential for every "traveller", while the latter is necessary for everyone. He also pointed out that reliance on the "educator" - *shaykh* is the approach of the modern (*muta'akhkhirīn*) ṣūfīs, while the ancients relied on the "instructor" - *shaykh*.[84]

Ibn 'Abbād stressed that the initiation to the msytic state (*ḥāl*) exclusively belonged to special individuals. No one could open its doors except those whom God had chosen for that purpose.[85]

INVOCATION AFTER THE PRAYERS

The mention of the ruling Sulṭān or Khalīfa as a symbol of legitimacy had long been accepted in practice. Al-Muwaḥḥidūn gave the practice much more significance by making some additions. Especially the Muwaḥḥid Caliph 'Abd al-Wāḥid al-Rashīd (630-640/1232-1242), fearing the dissensions among various groups of the family and in order to check a general decline of al-Muwaḥḥidūn, re-established Mahdī's (Ibn Tūmart) institutions which had been discontinued by such caliphs as al-Manṣūr (580-595/1184-1199) and al-Idrīs Ma'mūn (620-630/1229-1232).[86] One of such institutions was the invocation of the name of the ruling caliph after the prayers in congregational form. This was an innovation, but it gradually became so much established that opposition to it was considered a political as well as a religious offence, punishable by death.[87]

Contrary to the claim of the other *fuqahā'* about the consensus on the acceptance of this practice, Shāṭibī argued that it was a *bid'a* and that scholars had always expressed their dissent against this practice. When this practice was introduced into Spain in the twelfth century, some of the Mālikī *fuqahā'*, namely Abū 'Abd Allāh b. Mujāhid (d. 574/1178) and his disciple Abū'l 'Imrān al-Mīrtalī, opposed it at the risk of their lives.[88]

The practice continued even after the Muwaḥḥidūn, obviously for political reasons. Most probably it was Shāṭibī who publicly opposed this practice by disregarding it whenever he was leading the prayers. This public act of defiance raised havoc for Shāṭibī. The issue became a subject of heated discussion; Shāṭibī, however, did have some followers. From a letter written by Shāṭibī to one of his followers, it appears that an *imām* who rejected this practice in favour of Shāṭibī's position was deposed from his *imāma* and was denied all other privileges and was put to trial.[89]

The first two refutations offered against Shāṭibī were the following: one by the Qāḍī of Andalusia, Abū'l Ḥasan al-Nubāhī, *Mas'alat al-du'ā ba'd al-ṣalāt*,[90] the other by the *muftī* and *mushāwir* of Granada and Shāṭibī's teacher Abū Sa'īd ibn Lubb. The book is called *Mas'ala al-'ad-'iyya ithr al-ṣalāt*.[91]

Shāṭibī's disciple Abū Yaḥyā ibn 'Āṣim (d. 813/1410) then wrote, refuting Ibn Lubb and supporting Shāṭibī.[92] Muḥammad al-Fishtālī, the Qāḍī al-Jamā'a in Fez wrote a refutation of Ibn 'Āṣim, supporting Ibn Lubb, entitled *Kalām fī'l-du'ā ba'd al-ṣalāt 'alā al-hay'a al-ma'hūda*.[93] Ibn 'Arafa (d. 803/1400), the Qāḍī of Tunis, also entered into the discussion when he was asked for a *fatwā* on this issue by someone in Garnada.[94]

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HIS WORKS

The following is a list of Shāṭibī's works known to us. They belong mainly to two fields; Arabic language and grammar, and jurisprudence.

1. SHARḤ 'ALĀ AL-KHULĀṢA FĪ AL-NAḤW

A commentary on *Alfiyya* by Ibn Mālik, in four parts:

Mentioned in:

(i) Al-Maqqarī, *Nafḥ al-ṭib*, Vol. VII, 275; (ii) Kaḥḥāla, *Mu'jam al-mu'allifīn*, I,118, (iii) Sarkīs, *Mu'jam maṭbū'āt al-'Arabiyya*, 1090; (iv) *Fihris al-azhariyya*, IV, 255; (v) *Nayl*, 48; (vi) Al-Makhlūf, *Shajarat al-nūr al-zakiyya*, 231; (vii) Zirkalī, *al-A'lām*, I,71.

MS. al-Azhariyya / 1487 / 10806. Beginning:

اللهـم انا نحمدك على ما علمت ونشكرك على ما انعمت

Four volumes containing Parts I, II, III and V, written in old naskh. Copyist's name: 'Umar b. 'Abd Allāh al-Manẓarāwī. The completion of the third part by the copyist is dated 868 and the fifth 872 A.H. Each page contains 27 lines, 27 cm.[95]

2. 'UNWĀN AL-ITTIFĀQ FĪ 'ILM AL-ISHTIQĀQ

Mentioned in:

(i) *Nayl*, 48; (ii) *al-A'lām*, I,71; (iii) *Shajara*, 231; (iv) Kaḥḥāla, *Mu'jam*, I, 118; (v) *Īḍāḥ al-maknūn* [Al-Baghdādī, *Īḍāḥ al-maknūn* (Cairo, 1945)], 127.

3. KITĀB UṢŪL AL-NAḤW

Mentioned in :

(i) *Nayl*, 49; (ii) *al-A'lām*, I,71; (iii) *Shajara*, I,231.

Shāṭibī mentions both of the above books (i.e. nos. 2 and 3) in his *Sharḥ al-alfiyya* but Aḥmad Bābā recalls reading elsewhere that Shāṭibī destroyed both of those works in his life-time.[96]

4. AL-IFĀDĀT WA'L-INSHĀDĀT/INSHĀ'ĀT

Mentioned in :

(i) *Nafḥ*, VII, 187-192, 276-301; X, 139-140; (ii) *Nayl*, 48; (iii) Sarkīs, *Mu'jam*, 1090; (iv) *al-A'lām*, I,71; (v) Kaḥḥāla, *Mu'jam*, I,119; (vi) *Shajara*, 231; (vii) Nwiya, *Ibn 'Abbād*, 252.

As mentioned earlier, the extracts of this work in *Nafḥ* and *Nayl* show that this was Shāṭibī's collection of class notes and discussions.[97] Maqqarī and Aḥmad Bābā, both have used it as a source of information about the scholars whom Shāṭibī mentioned in this work.[98]

5. KITĀB AL-MAJĀLIS

A commentary on the chapter of sale (*buyū'*) in the *Ṣaḥīḥ* of al-Bukhārī.

Mentioned in:

(i) *Nayl*, 48; (ii) *Shajara*, 231; (iii) Sarkīs, *Mu'jam*, 1090; (iv) *al-A'lām*, I,71.

6. AL-MUWĀFĀQĀT

The original title being *'Unwān al-ta'rīf bi asrār al-taklīf*. An epitome of this work was done by Qāḍī Abū Bakr b. 'Āṣim (d. 829 A.H.)[99]

Published

(a) First published in 1302/1884 in Tunis by the government press, edited by Ṣāliḥ al-Qā'ijī, 'Alī al-Shanūfī and Aḥmad al-Wartatānī. (b) Reprint of the first part of the above in Kāzān in 1327/1909 with an introduction in Turkish by Mūsā Jār Allāh. (c) Third (in fact, the second complete) print in 1341 /1923 in Maṭba' Salafiyya, Cairo, edited by Muḥammad al-Khiḍr Ḥusayn, the rector of Al-Azhar, and partly by Muḥammad Ḥasanayn al-'Adawī, the Administrator of the Religious Department, Government of Egypt. (d) Fourth print in Maṭba' Muṣṭafā Muḥammad (n.d.), edited with extensive notes by Shaykh 'Abd Allāh Darāz. (e) Fifth print in Maṭba' Muḥammad 'Alī, Cairo, in 1969, edited by Muḥammad Muḥiy al-Dīn 'Abd al-Ḥamīd.

7. KITĀB AL-I'TIṢĀM

Published

(a) Partly published in *al-Manār*, XVII, (1333/1913).[100]

(b) Published in Maṭbaʿ Muṣṭafā Muḥammad, probably in 1915. This edition was edited by Muḥammad Rashīd Riḍā, the editor of *al-Manār*. It is based on an incomplete MS. from the library of Shanqīṭī.

8.   A MEDICAL TREATISE

MS. University of Leiden: 139r-140r; CCO 1367; Warn/Or. 331-(3b).

The University of Leiden holds this MS. [101] The treatise is not mentioned by any major authorities on Shāṭibī. The catalogue, however, attributes this treatise to Shāṭibī and, significantly enough, it describes it as having been written down by his (Shāṭibī's) pupil (?) Ibn al-Khaṭīb. [102]

The probability that Shāṭibī was the author of this treatise is heightened by the following points. Among Shāṭibī's teachers, there is mention of one al-Shaqūrī. [103] We have no further information about him. From other sources we know that a family from Shaqūra was known as a family of physicians. Among them Abū Tamām Ghālib al-Shaqūrī and Abū ʿAbd Allāh al-Shaqūrī are known as the authors of medical treatises. [104] We also know that Ibn al-Khaṭīb was associated with both of these men. He is also the author of certain medical treatises. [105]

From these facts, it might conceivably be argued that Shāṭibī, having been taught by one of these Shaqūrīs, had an education in medicine and hence could be the author of a medical treatise.

9.   FATĀWĀ

1. **Preserved in:**

Al-Wansharīsī, *al-Miʿyār al-mughrib ʿan fatāwā ʿulamāʿ ifrīqiya waʿl-andalus waʿl maghrib* (Fas, 1314-15 A.H.), I, 22, 24, 229, 267-68; II, 230, 401-403; III, 163; IV, 146; V, 17-19, 50-51, 186-189, 192; VI, 254, 179; VII, 68-74; VIII, 235; IX, 163-165, 181, 478; X, 31-37, 82-83, 87, 88-91, 96-98, 107-111; XI, 6, 7, 8, 11, 16, 19, 28, 201-11.

2. **MS. Mentioned** in Caisiri, *Bibliotheca Arabica Hispana Escurialenisis,* I, 460/No: 1,096.
    Mentioned in : *Nayl*, pp. 49f.

NOTES

1. This is Aḥmad Bābā (d. 1036/1626), the author of *Nayl al-ibtihāj*. For details on his life and works see M. Cheneb, "Aḥmed Bābā" in *E.I.*, (1st ed.), Vol. I, 191-2; Levi Provencal, "Aḥmad Bābā", *E.I.*, (2nd ed.) Vol. I, 279-280; J.O. Hunwick, "Aḥmad Bābā and the Moroccan Invasion of the Sudan (1591), *Journal of Historical Society of Nigeria*, II (3, 1962), 311-28; same author, "A New Source for the Biography of Ahmad Baba al-Tinbukti (1556-1627)", *Bulletin of the School of Oriental and African Studies*, XXVII (1964), 568-593; Muḥammad Makhlūf, *Shajarat al-nūr al-zakiyya* (Cairo, 1349 A.H.), Vol. I, 298.

2. Available to us in two editions; in Maghribī script, (Fas: Maṭbaʿ Jadīda, 1317 A. H.); second edition, printed on the margin of Ibn Farḥūn, *Al-Dibāj al-mudhahhab* (Cairo 1351). (Henceforth the reference *Nayl* will refer to the latter edition).

    The question of Aḥmad Bābā's sources for *Nayl* has been dealt with by scholars with varied competence. To my knowledge the best review available is still that by Cherbonneau which is mainly a re-enumeration of the sources which Aḥmad Bābā himself mentions towards the end of *Nayl* (p. 361). Cf. the following:

    1. E. Fagnan, "Les Ṭabaqāt Malikites" in D.E. Saavedra, *Homenaje* à *D.E. Codera*, (Zaragoza, 1904), 110.

    2. Cherbonneau, "Lettre à M. Defremery sur Aḥmed Bābā le Tombouctien, Auteur du *Tekmilet ed -Dībādj*", *Journal Asiatique*, 5ᵉ serie, I (1853), 93-100.

3. Ibn al-Fakhkhār al-ilbīrī, Abū ʿAbd Allāh al-Maqqarī, Abū ʿAbd Allāh al-Tilimsānī and Abūʾl Qāsim al-Sabtī are some of such common teachers. Cf. Maqqarī [*Nafḥ al-ṭib*, (Cairo: Maṭbaʿ Saʿādā, 1949), VII, 187] gives an extract from al-Shāṭibī's *Ifādāt* where al-Shāṭibī mentions Ibn al-Khaṭib among others who attended with him al-Maqqarī's lectures in 757 A.H.

4. See below p. 112.

5. Ibn Zumruk whom Ibn al-Khaṭīb patronized and who later replaced Ibn al-Khaṭīb when the latter defected to Tlemcen, was a close friend of al-Shāṭibī. See *Nafḥ al-ṭib*, X, 139 and F. de al Granja, "Ibn Zamrak", in *E.I.* (2nd ed.) Vol. III, 972-73.

6. Ibn Khaldūn's *Shifāʾ al-sāʾil li tahdhīb al-masāʾil,* ed. by Muḥammad b. Tāvīt al-Ṭanjī (Instambūl, 1957) was written in response to a query sent to scholars in the West of whom the names of Ibn Qabbāb and Ibn ʿAbbād are confirmed by Wansharīsī. The attribution of this treatise to Ibn Khaldūn has been doubted by scholars. See: Ṭalbī, "*Ibn Khaldūn*", *E.I.* (2nd edition), Vol. III, p. 828. Ṭanjī, the editor of this work, however, argues in detail in favour of such attribution. He is of the opinion that it was Shāṭibī whose *taqyīd* (query) is referred to in this treatise. See his Introduction, p.ṭ.

7. Shāṭibī, *al-Iʿtiṣām*, ed. Rashīd Riḍā, (Cairo, 1915), Vol. II, 84, quotes an extract saying "As narrated by one of our contemporary writers" which exactly corresponds with *al-Iḥāṭa*, (Cairo, 1319 A.H.), Vol. I, p. 75.

8. Various dates have been suggested for the year when *al-Iḥāṭa* was completed. For instance Mahdi, [*Ibn Khaldūn's Philosophy of History* (Chicago, 1964), p. 35, n. 5] suggests 763/1361-62. This date is not possible because (1) Ibn Al-Khaṭīb enumerates among the works of Ibn Khaldūn, already completed, a treatise on logic which he wrote for Sulṭān Muḥammad V of Granada. We know that Ibn Khaldūn's stay in Granada was in 764-65. Hence the date of *al-Iḥāṭa* must be after 765/1363. (2) Secondly, *al-Iḥāṭa* recounts the events in the year 771/1369 (op. cit. Vol. II, p. 58), which places the date of its completion after 771/1369. It is because of the second evidence that we believe that *al-Iḥāṭa* must have been finally completed in 771/1369.

9. *Nafḥ al-ṭīb*, IV, 195-201.

10. For details on the literature of Mālikī Ṭabaqāt see: E. Fagnan, 'Les Ṭabaqāt Malikites' pp. 105-113.

11. *Nayl*, p. 30.

12. For instance, Ibn al-Qabbāb was a well-known jurist in this period, but Ibn Farḥūn derives his information about him from *al-Iḥāṭa* (of which probably the fragments were availble to him). Al-Qabbāb's commentary on *Qawā'id al-islām* is noticed in the following manner: "someone among my pupils mentions that he (i.e. al-Qabbāb) wrote a commentary on *Qawā'id al-Islām*". *Al-Dībāj al-mudhahhab*, op. cit. p. 41.

13. The author's note at the end of the book sets the date of its completion in 761 A.H. (*Ibid.*, p. 362). There are, however, many entries which mention dates beyond 761 (*e.g.* pp. 83, 330); one of them even mentions the date 803. Fagnan (*op. cit*, p. 110) considers such entries as later interpolations and to him the date of its completion is certainly 761.

14. *Al-Dībāj*, p. 2.

15. See Fagnan, *op. cit.* p. 111.

16. Still in Manuscript form. (Bibliothèque Nationale de Pairs No. 4627, aussi no. 4614; Zaitūna, No. 3245) *vide* Fagnan *op. cit.* p. 111.

17. See for instance *Nayl*, pp. 51, 52, 88.

18. Among these notices we may mention the following:
(1) Ignaz Goldziher, *Streitschrift des Gazālī gegen die Batinijja - Sekte* (Leiden, 1916), pp. 32-34, where he mentions *al-Muwāfaqāt*. (2) D.S. Margoliouth, "Recent Arabic Literature" in *J.R.A.S.* (London, 1916), pp. 397-98, where he reviews *al-I'tiṣām*. Among the biographical notices are: Brockelmann, *Supp. II*, 374-75; Muḥammad Makhlūf, *Shajarat al-nūr al-zakiyya*, (Cairo, 1349), p. 231; Ismā'īl Pāshā Baghdādī, *Iḍāḥ al-maknūn*, supp. to *Kashf al-ẓunūn* (Cairo: Bahiyya, 1945), Vol. II, p. 127; Maḥmūd Ḥasan al-Tonikī, *Mu'jam al-muṣannifīn*, (Beirut, 1344), Vol. IV, pp. 448-454; 'Abd al-Muta'āl al-Ṣa'īdī, *Al-Mujaddidūn fī'l-Islām* (Cairo, Namūdhajiyya, n.d.), pp. 307-12; Fāḍil b. 'Āshūr, *A'lām al-fikr al-islāmī fī tārīkh al-maghrib al-'arabī* (Tunis: Najāḥ, n.d.), pp. 70-77; Yūsuf Ilian Sarkīs, *Mu'jam al-maṭbu'āt al-'Arabiyya wa'l - mu'arraba*, Vol. I, (Cairo, 1928) p. 1090; Khayr al-Dīn al-Zirklī, *al-A'lām*, Vol. I (2nd ed., 1954), p.71; Kaḥḥāla, *Mu'jam al-mu'allifīn* (Dimashq, 1957), Vol. I, pp. 118-19.

19. The extract of the relevant entry of this work is available to us in *al-Muwāfaqāt*. (Tunis edition, 1302), Vol. IV, as an appendix, pp. 1-4

20. *Nayl* was completed in 1005 A.H. (Fagnan, *op. cit.*). For details on this invasion and Aḥmad Bābā's life, see the sources mentioned above in n.1.

21. *Nayl*, p. 12.

22. Compare the sources mentioned towards the end of *al-Dībāj* by Ibn Farḥūn and those mentioned by Aḥmad Bābā for his *Nayl*. Aḥmad Bābā's sources mostly relate to the Muslim West, while *al-Iḥāṭa* is the only source related to the Muslim West, which is mentioned by Ibn Farḥūn.

23. *Nayl*, p. 16.

24. *Ibid.*, p. 46.

25. A well-known and influential scholar in Tunis in Shāṭibī's time. He was *imām* of Zaytūna mosque for 50 years. He was the foremost among Ibn Khaldūn's rivals when the latter was staying in Tunis. He had correspondence and discussions with Shāṭibī on the question of *murā'āt al-khilāf*. See Ibn Maryam, *al-Bustān fī dhikr al-awliyā' wa al-'ulamā' bi Tilimsān*, Ed. Muḥammad b. Cheneb (Algiers, 1326 A.H.), pp. 194-195.

26. *Nayl*, p. 277.

27. *Ibid.*

28. *Ibid.*, p. 217.

29. Abū'l 'Abbās Aḥmad al-Wansharīsī (d. 914/1506), *Al-Mi'yār al-mughrib wa'l-jāmi' al-mu'arrab 'an fatāwā 'ulamā' Ifrīqiya wa'l Andalus wa'l Maghrib*, (Fās, 1314 A.H.)

30. See *Nayl*, pp. 69, 283, 346.

31. Maqqarī supplies lengthy extracts from *al-Ifādāt* in *Nafḥ*, Vol. VII, pp. 187-192 (regarding Abū 'Abd Allāh al-Maqqarī); pp. 276-301 (about Ibn al-Fakhkhār al-ilbīrī), and Vol. X, pp. 139-40 (about Ibn Zumruk).

32. *Al-I'tiṣām*, op. cit. pp. 9-12.

33. *Al-Muwāfaqāt*, Vol. IV, pp. 150f.

34. I. Goldziher, [*Streitschrift des Gazālī gegen die Batinijja-sekte* (Leiden, 1916), p. 32] said that Shāṭibī "dem aus Xativa stammenden, später in Granada lebenden". The same mistake was carried over by Brockelmann, *G.A.L.S.* II, p. 374; "aux Xativa, gest in Granada". Asin Palacios was also misled by the *nisba*, as he stated that Shāṭibī lived in Shāṭiba, see Asin Palacios transl. by M.L. de Cèligny. "Un Precurseur Hispano-Musulman de Saint Jean de la Croix". *Etude Carmèlitaines*, 1932, p. 121-22, *vide* P. Nwiya, *Ibn 'Abbād*, op. cit., p. 173, n.2.

35. Levi-Provencal, "Shāṭiba", *E.I.* (1st ed.) Vol. IV, p. 337.

36. See for details Ch. I.

37. See above note no. 3 and *Nafḥ al-ṭīb*, op. cit., Vol. VII, p. 275; *Shajara*, op. cit., Vol. I, p. 228.

38. *Nafḥ al-ṭīb*, Vol. VII, pp. 276-278; 297-301.

39. Kaḥḥāla, *Mu'jam*, op. cit., Vol. VIII, p. 252.

40. *Shajara*, op. cit., Vol. I, p. 233.

41. *Nayl*, p. 219.

42. *Shajara*, p. 230.

43. See below pp. 108, 127f.

44. *Nayl*, p .47.

45. *Nafḥ al-ṭīb*, Vol. VII, p. 134.

46. *Al-Iḥāṭa*, Vol. II, p. 139.

47. *Nayl*, p. 250

48. *Shajara*, p. 232.

49. *Nafḥ al-ṭīb*, Vol. VII, p. 206.

50. See above p. 61f.

51. *Nafḥ al-ṭīb*, Vol. VII, pp. 232-249.

52. *Nayl, op.cit.*, p. 245, 346; *Shajara*, I, p. 234.   Zawāwī was alive until 770 A.H.

53. *Nayl*, p. 346.

54. This extract from Shāṭibī's *al-Ifādāt* is quoted by Aḥmad Bābā in *Nayl*, p. 349 and by P. Nwiya, in *Ibn ʿAbbād de Ronda*, p. XXXIX, no. 2.

55. Muḥsin Mahdī, *op. cit.* p. 35, n. 2; *Nayl*, p. 256.

56. *Nayl*, p. 256.

57. *Ibid.* p. 258.

58. The lack of interest in uṣūl al-fiqh is observed by Ibn Saʿīd as quoted by Maqqari in *Nafḥ al-ṭīb*, Vol. I, p. 206.

59. *Al-Iʿtiṣām*, Vol. I, p. 9.

60. See below pp. 209ff.

61. *Nayl*, p. 221.

62. *Ibid.*

63. *Al-Muwāfaqāt*, Vol. I, *op. cit.*, p. 22.

64. Shāṭibī, in a letter to his friend, implies that dismissal from the office of *imām* or *khaṭīb* of a mosque was usual after one had opposed *bidʿa* practices. See Wansharīsī, *al-Miʿyār al-mughrib*, Vol. XI, p. 109.

65. Leon Bercher, (ed. Transl. and Comment. on) Ibn ʿĀṣim al-Mālikī al-Gharnāṭī, *Al-ʿAcimiyya ou Tuḥ'fat al-ḥukkum fī nukat al-ʿuqoud waʾl aḥ'kam*, (Alger, 1958), Introduction, p. III.

66. *Nayl*, p. 49.

67. *Ibid.*

68. *Al-Iʿtiṣām, op. cit.* p. 9f.

69. *Ibid.*, p. 11.

70. *Ibid.*, p. 11 ff.

71. See below pp. 108f.

72. *Ibid.*

73. *Al-Muwāfaqāt*, Vol. I, p. 102.

74. *Ibid.*, p. 103.

75. Ibn Khaldūn, *Shifāʾ al-sāʾil, op. cit.*, describes the controversy between those who attached significance to books and those who favoured the necessity of *Shaykh*, in the form of an interesting dialogue.   See pp. 79-85.

76. See above p. 56f.

77. *Al-Iʿtiṣām, op. cit.*, p. 208.

78. Ibn Khaldūn, *Shifāʾ al-sāʾil, op. cit.*, p. 11.

79. P. Nwiya (Ed.), *Ar-Rasāʾil aṣ-Ṣugrā*, (Beiruth: Imprimerie Catholique, 1958), pp. 106-115, and Appendice C, pp. 125-138.

80. P. Nwiya, *Ibn ʿAbbād de Ronda*, (Beiruth: Imprimerie Catholique, 1956), pp. 209-13.

81. Ṭāvit Ṭanjī. *op. cit.*   Our references to *Shifāʾ* are based on this edition.

82. P. Khalīfa. (ed.) Ibn Khaldūn, *Sifā as-sāʾil litahzīb al-masāʾil* (Beyrouth, 1958).

83. Ibn ʿAbbād, *Ar-Rasāʾil aṣ-Ṣugrā* (ed. P. Nwiya) *op. cit.*, p. 106.

84. *Ibid.*, p. 107.

85. *Ibid.*, p. 109.

86. A. Bel, " ʿAbd al-Wāḥid al-Rashīd", *E.I.* (1st ed.) Vol. I. p. 66.

87. *Al-Iʿtiṣām, op. cit.*, Vol. II, p. 237.

88. *Ibid.*, pp. 237-8.

89. Al-Wansharīsī, *Al-Miʿyār*, Vol. XI, p. 109.

90. Levi-Provencal, introduction to Al-Nubāhī, *Al-Marqabat al-ʿulyā*, p.ṭ.

91. *Shajara, op. cit.*, p. 231.

92. *Ibid.*, p. 247.

93. *Nayl, op. cit.*, p. 266.

94. Wansharīsī, *Al-Miʿyār*, Vol. VI, pp. 258ff.

95. *Fihris maktabat al-Azhariyya*, V (Cairo, 1946), p. 255; also see ʿAbd al-Ḥafīẓ Manṣūr, *Fihris makhṭūṭāt al-maktabat al-Aḥmadiyya bi Tūnis*, (Bayrūt: Dār al-Fatḥ, 1969), pp. 316-319.

96. *Nayl*, p. 49.

97. See above p. 98. Recently P. Nwiya [*Ibn ʿAbbād de Ronda*, (Beyrouth, 1956), pp. XXXIX, 252] has consulted this MS. in Morocco. The present writer has, however, failed to locate it.

98. See above notes 31, 54.

99. *Shajara*, I, p. 247.

100. These extracts from *al-Iʿtiṣām* were mistaken for extracts from *Al-Muwāfaqāt* by I. Goldziher, and the same mistake was carried over in Brockelmann.

101. Voorhoeve, *Handlist of Arabic Manuscripts*, (Library of University Leiden), (Lugduni: Batavorum, 1957), p. 238

102.   *Ibid*.

103.   *Nayl*, p. 47.

104.   See Renaud, "Un médecin du royaume de Granade: Muḥammad as-ṣaqūri," *Hesperis* Vol. XXXIII (1946), pp. 31-64.

105.   Renaud, "Deux ouvrages perdus d'Ibn al-Ḥaṭib: Identifiés dans des manuscrits de Fès - Conclusion sur Ibn al-Ḥaṭib medecin", *Hesperis*, XXXIII (1946), pp. 213-225.   Also *Nayl*, pp. 264-265.

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CHAPTER THREE

FATĀWĀ

In Chapter one we discussed in general the political, social, religious, economic and legal developments in the fourteenth-century Granadian society. In the course of that discussion we indicated how the society was undergoing some significant changes. The spread of *ṣūfī ṭarīqas*, the influence of Rāzism, and the establishment of a *madrasa* system were particularly imporatnt contributions to the decline of the supremacy of the *fuqahā'*. More significant were the economic changes caused by new developments in Mediterranean trade that geared the Andalusian economy to a type of mercantilism. These changes were immediately felt in the domain of Islamic law. The existing legal system was not able to accommodate these new circumstances.

In a number of situations, the new practices apparently came into conflict with the teachings of Islamic law. Perplexed, the people asked the jurists to solve the resultant problems. The jurists, in their *responsa* (*fatāwā*) made an attempt to reconcile the new practices with Islamic law or to reject them.

This chapter studies Abū Isḥāq Shāṭibī's *fatāwā* with the following questions in mind:

(a) What subject matters in Islamic law were affected by these social changes and to what extent?

(b) In which subject matters did the Islamic law adopt the social changes?

(c) To what extent were these social changes related to the social conditions discussed in the preceding chapters?

(d) How did the legal theory respond to these social changes? What methods were used to adopt or reject these changes?

Shāṭibī's *fatāwā*, studied in this Chapter, are available to us in the following sources:

(1) Al-Wansharīsī `Al-Mi'yār al-Mughrib...., (12 volumes).[1]
(2) Lopez Ortiz, "Fatawa Granadinas...."[2]

In this study, in addition to the above-mentioned *al-Mi'yār*, Lopez Ortiz used another collection of *fatāwā* that still exists in manuscript form.[3]

(3) Certain references to Shāṭibī's *fatāwā* in the following: *Al-Muwāfaqāt*, *Al-I'tiṣām*, and *Nayl al-Ibtihāj*.

The total number of *fatāwā* studied in this chapter is 40 and they may be distributed in the following categories:

(i) Exegesis: 1;
(ii) Theological matters: 2;
(iii) Ritual and worship, cleanliness, rituals, prayers: 12;
(iv) Family, divorce, inheritance: 5;
(v) Property, objects of property, *waqf*: 5;
(vi) Taxes, *zakāt*, *kharāj*: 3;
(vii) Contract, sale, hire and lease, society: 11;
(viii) Procedure, witness: 1.

EXEGESIS

Responding to a request, Shāṭibī explains in his *fatwā* the meaning of an *hadīth qudsī*[4], in which God is quoted showing His affection and closeness by becoming the ears, hands and feet of a person who endeavours to approach Him. Shāṭibī finds that this *hadīth* implies anthropomorphism, but without denying the authenticity of the *hadīth*, he explains how the apparent anthropomorphic implications can be removed by the method of *ta'wīl* (interpretation)[5].

Strictly speaking, "exegesis" is not a *fiqhī* subject matter; the *fiqh* books generally do not include discussions on this subject. Yet exegesis often finds a place in *fatāwā*. Such questions, however, arise out of certain problems which are indirectly related to practices which may come into conflict with the teachings of Islamic law. The response in question was most probably prompted by the spread of ṣūfism in the Andalus.

THEOLOGICAL MATTERS

Again, discussions about theology are not one of the subjects treated in *fiqh* books, yet it is a very common subject in *fatāwā*. It may also be argued that since a larger part of the provisions of Islamic law are applicable only to Muslims, the question of "who is a Muslim", even though a theological question, is quite relevant to *fiqh*.

In addition to the above, Shāṭibī's two *fatāwā* reveal another aspect of the relevance of dogma to *fiqh*. A dogma may sometimes impose restrictions on certain acts.

Shāṭibī was asked about a ṣūfī who interpreted Qur'ānic terms to his own advantage, claiming that commands about worship were metaphoric. The ṣūfī also insisted that direct knowledge of God was possible and that books did not provide true knowledge.

Shāṭibī in very clear terms declared that the ṣūfī was a *kāfir*, and that he must be sentenced to death (*wājib al-qatl*). This "ṣūfī" rejected and ridiculed the "*sharī'a*" and its transmission and mocked the names of God.[6]

This *fatwā* appears to disagree with Shāṭibī's view on heresy. As Fazlur Rahman has pointed out, Shāṭibī categorically states that "it is not possible to locate absolutely the capital errors of these sects so that they may be stigmatized as *kuffār*."[7] Shāṭibī is quite clear, Rahman observes further, that erroneous beliefs and practices can and must be exposed but that it is impossible to locate absolutely the holders of these practices."[8]

The above-cited view of Shāṭibī does not correspond with his absolute belief in the *kufr* of an individual ṣūfī or in the unacceptability of the practices mentioned in the *fatwā*. We do not, however, here face a contradiction. Rahman's observations are derived from a certain context where Shāṭibī is discussing a problem of heresiology.[9] Is it possible to define *firqa nājiya* (the saved sect), the sect which is on the right path to

the exclusion of others? Shāṭibī, there, is dealing with the impossibility of such a definition. This stand, however, does not mean that the beliefs and practices implying *kufr* cannot at all be located; Shāṭibī's stress is rather on the impossibility of locating the one sect with the absolute truth.

The other *fatwā* related to this subject matter concerned the wax industry. For their Christian customers the Muslim artisans manufactured wax candles resembling hands in prayer. This resemblance apparently violated the teachings of Islam about strict monotheism that forbade any representation of the human figure in sculpture or paintings, since such an attempt would resemble God's act of creation. Shāṭibī dismissed the objection and declared this industry lawful. Quoting earlier Mālikī jurists, Shāṭibī argued that what is forbidden is the representation of the complete figure; a figure without its head in particular had been previously permitted in Mālikī *fiqh*.[10].

RITUAL AND WORSHIP

A number of new practices, mostly under the influence of ṣūfism, had been introduced in this domain. These new practices were considered *'ibādāt*. In his response to the inquiry about these practices, Shāṭibī condemned them on two grounds: first, that they were *bid'a* (innovations) and second, that they imposed certain practices as religious obligations, whereas the right of imposing such an obligation belongs only to God. The practices condemned by Shāṭibī in this regard included the following:

(a) Reciting in congregation the Qur'ānic chapter *Yāsīn* on the occasion of bathing the deceased in preparation for burial.[11]

(b) The practice of the group of people called *ṣūfiyya* who assembled in some *zāwiya*, performing *dhikr* (chanting the names of God or some such formula), singing and reciting poetry.[12]

(c) Congregational recital of the *Ḥizb*[13] (certain prayer formulas).[14]

(d) Recital of certain books in congregation in the Mosques.[15]

(e) The congregational invocations after the regular prayers (*ṣalāt*).[16]

(f) The practice of insisting on the completion of the recital of the Qur'ān in the month of Ramaḍān.[17]

(g) Saying loudly the *takbīr*s (the formulae declaring the Greatness of God) on the eve of *'Īd* prayers.[18]

(h) Shaking hands and embracing each other after the *'Īd* prayers.[19]

(i) Adding certain sentences in the *'adhān* (call to prayer).[20] In al-I'tiṣām, Shāṭibī refers to the practice of adding the following in the call for morning prayers: "The day dawned, praise be to God".[21]

(j) *Taṣbīḥ al-ghabīr:* It had become the practice of the people that after the burial of the deceased, they gathered for seven days and recited the Qur'ān loudly in congregation. Shāṭibī considered the custom equivalent to *ma'tam* (mourning) which was forbidden in Mālikī *fiqh*.[22]

Whereas the above ten responses emphatically rejected the common religious practices as *bid'a*, there were two customs in regard to which Shāṭibī showed flexibility. In Mālikī fiqh uncleanliness (*najāsa*) is a legal qualification (*ṣifa ḥukmiyya*) in opposition to the sensory (*ḥissiyya*) or rational (*'aqliyya*) qualification.[23] Cleanliness (*ṭahāra*) can be determined only on legal bases. *Khamr* (wine) and *mayta* (a corpse) are unclean according to the Qur'ān.[24] Accordingly if either of these two happens to fall into something, they make that thing unclean, and that uncleanliness cannot be removed by sensory or rational methods.

Two such situations arose, and were referred to Shāṭibī for an opinion. In one case a piece of earthenware was made unclean by *khamr*;[25] the other case concerned some unclean thing (in another similar *fatwā* this "unclean thing" was the ink made unclean by the dead body of a mouse in it)[26] fallen on the Qur'ān. Other *muftīs* declared these things unclean and their usage not permissible; the earthenware to be disposed of and the Book to be buried.[27]

Shāṭibī, however, had a different view. In the case of the earthenware, he held that if it were enameled, it could be cleaned with water in an ordinary manner. Otherwise, it should be washed thoroughly with hot water. If hot water is not available, then it might be washed with cold water but allowed to soak for a while. Its cleanliness would then be decided by ascertaining that water standing in it does not change its colour, flavour or smell.[28]

In the case of books, Shāṭibī advised that if water would not harm or efface the writing, the books should be cleaned with water; otherwise the uncleanliness should be removed as much as possible by other means and the book allowed to stay as it was.[29]

FAMILY

Someone repudiated his wife with the regular expression of the formula of divorce, and after some time he also pronounced ẓihār (another form of repudiation by expressing the formula: "You are for me as the back of my mother"). Afterwards, however, he neither expressed repudiation nor revoked it. Shāṭibī was asked about this case; whether the divorce had come into effect or not. Treating ṭalāq and ẓihār as two distinct acts, Shāṭibī advised that in the Mālikī school one declaration of repudiation was revocable (rajʿī) and not definite (bāʾin). Hence, in this case, since the declaration of repudiation was not repeated, the marriage was not yet dissolved. If the man still wanted to resolve the marriage, the dissolution was possible only after paying the kaffāra (penalty) for ẓihār.[30]

The other three cases under this category concerned inheritance. Whereas the above case of divorce does not appear to have emerged from the changing conditions of the society, the following three were quite possibly related to these changes.

A certain Muslim committed apostasy. Soon after, his father died. Since in Mālikī law an apostate is not entitled to inherit from his Muslim father, this person immediately reconverted to Islam. Shāṭibī denied the son the right of inheritance on the following ground: First the cause of the transfer of the deceased person's property to the other inheritors was the "death of the owner", not the "disposal of the property", hence the right of inheritance belongs to whoever was rightful heir at the time of death. If the other heirs wished, they might give the son some part of the inheritance as a gift; or alternatively he could be granted assistance from Bayt al-māl.[31]

An opposite opinion in favour of the son was possible but Shāṭibī insisted that the common practice of the Mālikī school be adhered to. It appears that a strict attitude was adopted to discourage apostasy, the growth of which is conceivable under changing circumstances.

In another case of inheritance, the wife of a cloth merchant, on the death of her husband withheld, a certain amount of clothing. The heirs

claimed that this clothing was part of the inheritance. The wife claimed that her husband gave the clothing to her as gifts, but she could not produce any witnesses. Shāṭibī advised that in such a case, where there was a possibility that the clothing was part of the merchandise belonging to the deceased husband, the wife's statement could not be accepted without witness. Nevertheless the heirs should be asked to declare under oath that they did not know whether the deceased had made such gifts.

Shāṭibī, however, explained that there was no dispute if the clothing belonged among the household articles or had already been in use by the wife.[32]

Shāṭibī took a similar stand in another case of inheritance, where the wife claimed that the house in which she and her husband had lived had been given to her by her husband as a marriage gift (shawār).[33]

PROPERTY

OBJECTS OF PROPERTY

As referred to earlier[34], some of the cultivated land around Granada along the river Manṣūra was quite steep. For the purpose of irrigation small dams had to be built and the users had to take turns using the waters. These turns were strictly determined and were often passed on to the heirs as transferable rights. At times, however, some heirs either gave up cultivation or allowed their land to become barren, so that they had no use for the water. They, therefore, began to sell their portion of water to the actual users.

A dispute arose out of such a situation, and Shāṭibī was asked about it. He emphatically declared that the water was not an object of property, and that its use could not be owned by any person. He, however, distinguished between two kinds of water; such water as is in rivers and in desert ponds was not the object of property, while those waters which were either purchased with or belonged to a land, which itself was private property could become the object of property. Yet no right of ownership could be claimed on the waters of rivers by virtue of the building of dams.[35]

ḤABS

The question on this subject was most probably asked by Abū ʿAbd Allāh al-Ḥaffār, who was appointed as supervisor of awqāf.[36]

Someone willed that one third of his estate be demarcated as *waqf* (trust), for the purpose of celebrating the birthday of the Prophet.

Shāṭibī, in his response to the inquiry about this will, resolved that such a will was unlawful and hence could not be executed. The reason for its unlawfulness, according to Shāṭibī, was that the celebration of the Prophet's birthday was an innovation and hence unlawful.[37]

The other two responses relating to *waqfs* indicate the confusion in the practice of *waqf* as well as the juridical strictness in abiding by the rules of *waqf*.

For the maintenance of mosques certain *aḥbās* (trust properties) were attached to them. The officer in charge of these *aḥbās* decided to rearrange the distribution of the income among various mosques, so that the income of some of the mosques be increased. Shāṭibī was consulted; he explained that the income of the mosques could be increased either from *bayt al-māl* or from *aḥbās*. Whereas there were some restrictions in the case of *aḥbās*, there was nothing against such an increase from *bayt al-māl*. This view is based on the distinction between the different objectives of *bayt al-māl* and *habs*; whereas the essence of the latter is *ta'yīn* (specification), the basis of the former is *'adam ta'yīn* (non-specification). Because of *ta'yīn*, the increase from *aḥbās* would become problematic. Re-arrangement of the distribution of trust income was not possible if it was definitely known that the trust was specified for a certain mosque or a certain purpose. It would be possible only if it were known that a certain number of *aḥbās* were specified for mosques but that the mosques were not specified individually. Shāṭibī, however, explained that, formerly, these *aḥbās* had been specified, but later, due to negligence, or because they were considered analogous to *bayt al-māl*, these specifications became confused. Then the share of each mosque was decided at the discretion of the officer in charge. In fact, it was not permissible to combine various trusts in order to increase the income of mosques.[38]

Shāṭibī took a similar view in another case of *aḥbās*. Someone bought the trees on a tract of land that was adjacent to a *habs* property. A doubt passed through his mind that this tract of land might be the *anqāḍ* (the demolished and unused parts of an estate) of that *habs*. In Mālikī *fiqh*, the act of sale of a *habs* property is legally void and if this act were knowingly committed, it was punishable by the court.[39] Yet it was a common practice in the Andalus to sell the *anqāḍ* of a *habs* and, often the

habs and *milk* (ordinary property) were confused or joined deliberately, to share the income of such a sale. The person concerned asked Shāṭibī what to do.

Shāṭibī replied that the practice of combining *habs* and *milk* is like mixing *ḥalāl* (lawful) and *ḥarām* (forbidden). As for the sale of *anqāḍ* the legal view was not as categorical as on *habs* itself. The Mālikī scholars had different opinions. Yet Shāṭibī explained that this difference of opinion, in fact, emerged from the different bases of analogy. Ibn Mawwāz made the *anqāḍ* analogous to *'arāḍī sulṭān* or *'arāḍī bayt al-māl* (crown land) and therefore, permitted flexibility in the sale and long-term lease of *anqāḍ*. Shāṭibī differed on this point on the basis of his distinction between *bayt al-māl* and *habs*.

He advised the person in question to go to the court for the cancellation of the sale contract; otherwise, he should appeal to the Sulṭān. This person accordingly appealed to the Sulṭān after securing *fatāwā* from 'Abd Allāh Ibn al-Ḥaffār and Ibn 'Allāq which were endorsed by Shāṭibī. The Sulṭān accepted the opinion of the *muftīs* and referred the case to the *qāḍī* concerned. Despite the Sulṭān's orders, the upholders of the practice prevailed upon the *qāḍī*. They shouted and condemned the plaintiff for opposing the practice. The *qāḍī*, for fear of disturbances, gave a verdict in favour of continuing the practice.[40]

TAXES

In the three *fatāwā* pertaining to taxes, Shāṭibī departed from the traditional viewpoint. In fact, Lopez Ortiz interpreted this departure as "the skill of an economist from the fiscal point of view".[41] Two of these *fatāwā* concerned *kharāj* and one was about *zakāt*.

In view of the deteriorating financial conditions, the Sulṭān levied a few additional taxes. One of these new sources of revenue was a tax levied on the building of walls in or around Granada. The *muftī* of Granada, Ibn Lubb, declared such taxes unlawful, because they were not provided for in the *sharī'a*.

Shāṭibī disagreed with Ibn Lubb. He viewed taxation from the point of view of *maṣlaḥa* (public weal). His idea was, and he quoted Ghazālī and Ibn al-Farrā' in his support, that the safeguarding of public interests was essentially the responsibility of the community. In situa-

tions when they could no longer carry out this responsibility, the community may transfer it to the public treasury and contribute from their wealth for this purpose.   With this aim in view, the public treasury is in constant need of such contributions.   Especially in circumstances similar to those found in Shāṭibī's period, when the treasury had to pay a heavy tribute to the enemy.   The levying of new taxes was, therefore, quite in order.[42]

Shāṭibī applied this criterion even to *zakāt*. According to *al-Mudawwanat al-Kubrā*, *zakāt* on merchandise for sale could be levied only after the merchandise was sold and after one year had passed; it was to be levied on the price earned from the merchandise.[43] Accordingly the artisans did not pay any *zakāt* on their products, because, first, only a few of these products would be sold immediately and the rest would remain as potential money not yet taxable. Second, the condition of allowing one year to pass would be hard to meet if the investment in these products was an on-going process.

Shāṭibī viewed this practice in the light of the changing economic conditions, which gave these artisans ample opportunity for production and yet allowed them to avoid *zakāt*. Shāṭibī, therefore, opined that the products of the artisans should be taxed, as they were potentially sold merchandise.[44]

CONTRACTS AND OBLIGATIONS

One very conspicuous impact of the changing economic conditions can be seen in the area of contracts and obligations. The demand for raw materials in foreign markets generated extensive trade activities within Spain and with neighbouring principalities. On the other hand, these trade demands were confronted with the rising number of the population and the scarcity of resources within Andalus. It was quite understandable that such a situation necessitated the freedom of contracts to meet social demands.

In practice, as we shall see below, a number of new and complex forms of contracts emerged, but they did not always satisfy the stipulations of Islamic law. Islamic legal theory did not lay down any general principles of contract and obligation; yet its insistence on avoiding *ribā* (unjustified enrichment) and *gharar* (hazard, risk) put restrictions on a number of sales and associations. Despite such restrictions, the scholars of Islamic law have observed that Islamic commercial law showed much flexibility

and that custom played an important role.[45]   We should keep this observation in mind as we turn now to the responses which Shāṭibī made to inquiries about contracts.

CONTRACT OF SALE

Shāṭibī was asked about a widespread commercial apractice of Muslims in the Andalus who traded commodities such as weapons with the Christians; such trade was prohibited by the Mālikī scholars for obvious reasons. But in the particular case of the Andalus, the Muslims were forced to trade such commodities for food and clothing. The question was whether special concessions might not be granted to the Muslims of Andalus because of their peculiar circumstances. The second question was whether that prohibition applied also to the sale of candles to Christians, because those candles were used to invoke prayers against Muslims. The third problem was whether the 'aṭṭārs (pharmacists and general merchants) were obliged to abide by that prohibition.

In his response, Shāṭibī, first of all, denied any special concession to al-Andalus.   Cities (or countries) could not be classified on these bases; even the *hādin* (the inhabitant of a country which was on truce terms with another) or *harbī* (at war) territories could not claim such concessions. The only distinction that the Mālikī jurists maintained concerned the sale of food commodities.   They allowed such sales to an *hādin* but not to an *harbī*.   Shāṭibī did not allow such contracts of sale with Christians even on the basis of dire need for food articles in the Andalus.

As to the question about candles, if they were known to be used against Muslims, their manufacture and sale would both be unlawful.

Prohibitions, however, could not be imposed on the 'aṭṭārs, because they were merely salesmen; they did not know for what purpose their merchandise might be used. They had among their customers both Muslims and Christians.[46]

It is obvious, in this response, that Shāṭibī did not allow the sale of arms and other such articles which would eventually be used against the Muslims; yet this did not mean that trade with Christians was to be stopped altogether. The circumventing method of permitting the 'aṭṭārs to make such contracts of sale shows that the jurists did allow consideration for the dire needs of the people, even though as a general principle they would deny it.

Someone asked him if the common practice among the saffron merchants to mix the yellow stigma of saffron with the white styles of its pistils was not *ghashsh* (adulteration), analogous to the mixing of saffron with yellow colouring powder. Shāṭibī agreed that adulteration of saffron with yellow colouring powder was not permitted, but he disagreed with the analogy made to the practice of mixing the stigmas and styles of saffron. Rather, in his opinion, such 'mixing' was analogous to the 'mixing' of fig seeds with figs and raisin stems with raisins. In fact the matter comes down to the question of cutting the stigma of the saffron to remove it from its styles. In common practice, to do this is considered inconvenient. Since failure to cut the stigma does not make much difference in weight and its removal is not considered necessary, this practice should not be regarded as adulteration.[47]

Shāṭibī was consulted in another case of sale contract. Someone handed his merchandise over to a sales agent on the basis of a suggested price. A buyer offered a different price, the agent informed the owner, and the latter agreed to that price. The agent, however, asked the buyer to raise the price to which he agreed. Thus the agent sold the merchandise for more than the price agreed upon between him and the owner. Shāṭibī was asked if such a sale contract was valid.

He responded that, since the stipulation of a contract of sale (the offer ('*ijāb*) and acceptance (*qubūl*) had been fulfilled, the contract was valid and it could not be revoked. As to the question of the agent charging price higher than the one consented to by the owner, this fact did not invalidate the contract, because the owner's acceptance and bid to sell at a particular price was commonly understood as "sell it at this price if there be no higher offer", not as "sell it at this price only and do not accept higher offers".[48]

CONTRACT OF LEASE AND PARTNERSHIP

Beside the cases mentioned above in the category of sales, the rest of the cases pertaining to contracts overlap with the categories of lease and partnership. Two of the cases are even related to the category of 'joint ownership'. We have juxtaposed all these cases here, without imposing our own classification. The purpose of such treatment is to indicate the confusion in the original treatment of the cases.

With the exception of one which concerns the 'joint ownership of food', the rest of the cases in this category are related to agricultural contracts. For a fuller explanation of the context of the problems in these cases a few remarks about the Mālikī law on agricultural contracts must be made.

In broad terms the agricultural contracts are considered analogous to 'contracts of sale', and in a specific sense they are 'contracts of the sale of usufruct' (*ijāra*). Having inherited the confusions and un-certainties from the sale contracts in the early development of Mālikī theory and practice in Medina, Mālikī *fiqh* has become very complicated in regard to such questions. First confusion arose between two types of contracts for the lease of land; *musāqāt*, the lease of a plantation of fruit trees, and *muzāra'a*, the lease of a field. Early Mālikīs maintained distinctions between the two and regarded *muzāra'a* as valid only if the field were situated in the middle of the plantation.[49] Later, however, it seems that this stipulation was no longer observed, and *muzāra'a* came to be closer to a contract of partnership and *musāqāt* to that of hire of services. The second source of confusion was the prohibitions that concerned *ribā al-faḍl* (inequality in exchange of the same stuff), which implied the prohibition of the lease of one agricultural property for another and *gharar* (hazard, risk) or *juzāf* (undetermined quantities) which invalidated most agricultural contracts since the object of the contract, e.g. wages, was often undetermined. The third source of confusion was the failure to distinguish among contracts for hiring of services, contracts of lease of land and contracts of partnership. All three are treated as contracts of lease but the stipulations are often borrowed from other types of contract of sale. Furthermore, the stipulations of *ijāra*, that the period of time must be determined and the task be defined, were often ignored in *muzāra'a* and *musāqāt*.

Santillana marked out the following four basic types of contracts of *muzāra'a* in Mālikī *fiqh* involving situations where:

(a) The land, the labour, the seed, the animals and the tools of cultivation are shared by two parties, the produce to be shared by both.

(b) The land is common, one party provides the seeds, the other party provides the labour and the animals.

    (c) One party provides the land and the seeds, the other the labour and the animals.

    (d) One party provides the land and part of the seed, the other provides the other part of the seed and the labour as well as the animals.[50]

These types of arrangements indicate that *muzāra'a* in Mālikī *fiqh* is a contract of partnership (since it is also called *shirka fī al-zar'*), rather than a contract of sale; yet in reference to the distribution of the produce there is much similarity to a contract of sale of usufruct or to a contract of hire and lease. We turn now to the sepcific responses.

The *mukhtaṣṣ* lands belonging to *bayt al-māl* were leased to cultivators with the stipulation that every thing needed for cultivation would be provided by the cultivator himself and, furthermore, that he had to pay 1/5 plus 1/10 (or 1/9) of the produce if the land was provided with irrigational or other facilities.

When Shāṭibī was asked about this practice, he declared such contracts invalid because the contract confused two distinct obligations; the obligation to pay 1/5 which was the rent on the land and the obligation to pay 1/10 which was the tax on the land.[51]

Lopez Ortiz further observed that such contracts were not even valid instances of *muzāra'a* according to Mālikī *fiqh* since the landowner did not contribute anything more than just the land.[52]

Another source of confusion was the practice of hiring the farm labour. The regular types of contract of *muzāra'a* did not allow this. If the hire of labourers was considered to be the hire of services, then it was restricted by two stipulations:

    (a)   the wages could not be paid from the produce of the land, and

    (b)   an uncertainty existed in the payment of the wages.

These questions were raised in the case of contracts of labour and partnership regarding the collection of olives and the rearing of silk worms.

In the case of picking olives Ibn Sirāj responded to an *istiftā* that the contract for the hire of labour to collect olives could be considered *musāqāt* if the olives were not yet ripe. The contract would then consist of taking care of trees, irrigation... etc. The labour could be contracted for

in this case on the promise of payment of 1/4 or so of the produce. But if the olives were ripe and the task was only to collect them, such a promise of wages would make the contract invalid because the task was uncertain and the price of the amount of olives undetermineable.

Shāṭibī, however, explained further that if the task were to collect the olives by picking them from the branches or by shaking the trees, the contract was invalid and the wages unlawful. However, if the task were to collect olives that were already on the ground, a contract for the hire of labour may be allowed because in this case the labourer could guess how much he would eventually receive in wages.[53]

In the case of rearing silkworms, Ḥaffār, drawing an analogy with the *musāqāt*-type of contract, argued that a contract could be made only when the mulberry trees had grown leaves. The owner of the trees would contribute his share of leaves (1/2, 1/3, 2/3 or whatever had been agreed upon). The partner would also contribute his share of leaves. The owner of the silkworms would pay wages to the other in proportion to his share of leaves. In other words, this would be a case of partnership, and each of the partners would contribute his known shares. The common practice, on the other hand, was to contract before the appearance of the leaves and to pay the wages from the leaves or from silkworms.

Shāṭibī responded that, in principle, the wages were not to be paid from the produce, but if the case were made analogous to *muzāra'a* by equal partnership in leaves, silkworms... etc., such payment could be allowed because, in that case, the labour would stand equal to half of the partner's share of leaves.[54]

A more complex case of partnership was the practice of pooling milk to make cheese. Shāṭibī explained that, in principle, the mixing of milk in unequal quantities to make cheese could not be allowed because it resembled *muzābana* (a contract for barter of dried dates for fresh dates). The practice may also be associated with *gharar* and *ribā* which are prohibited. Yet the mixing of milk could be allowed by consideration of *tashīl* (convenience) and *raf' ḥaraj* (removal of hardship). The consideration of *ḥaraj* becomes relevant in this case because it would be inconvenient to produce cheese individually by keeping every partner's share of milk separate.[55]

A peculiar case of partnership had to do with the produce of a tree owned by more than two persons. The question was asked whether it were permissible to distribute the produce equally.

Shāṭibī did not allow such distribution because the matter of the tree was actually a case of partnership and not of joint ownership. Hence the distribution of the produce must be according to known shares. Shāṭibī suggested that to make such a distribution convenient the branches of that tree should be marked for every partner and then the produce be divided accordingly.[56]

CONTRACT FOR HIRE OF SERVICES

Shāṭibī was asked whether it was allowed for an *imām* (leader of prayers) to live on income from the *ḥabs* of a mosque, without any other vocation. Shāṭibī responded that the office of *imām* was a vocation, and if the person in question performed his duties, it was lawful for him to live on such income.[57]

An interesting case was the emergence of the appointment of *muʿīn al-dhabḥ*. In the meat market a person was hired by the butchers to supervise the killing of animals and to keep accounts of animals, meat and skins. He was paid partly by the butchers and partly by the sale of the meat. Shāṭibī was asked whether such an appointment was lawful.

Shāṭibī replied that if the consideration governing the appointment of *muʿīn al-dhabḥ* was to safeguard *maṣlaḥa* (public interest) in the observance of *sharīʿa* rules about the killing of animals, then in view of *fasād al-zamān* (corruption of contemporary conditions) or the ignorance of religious teachings, such an appointment could be allowed. If such considerations did not exist and the person was not qualified to carry out the rules, his appointment would fall into the category of reprehensible things. Furthermore, such a practice would impose upon the people hardships in those matters in which God had allowed convenience. The Prophet Muḥammad used to eat meat brought by *badawis* after simply saying the name of God.[58]

Abū ʿAbd Allāh Ḥaffār asked Shāṭibī if an increase in his salary received from the *bayt al-māl* was lawful. Shāṭibī replied that it was lawful only on two conditions:

(i) that the amount of work had increased and,

(ii) that the increased wages were commensurate with the increased work.

When Ḥaffār received that answer he wrote again saying that he had been receiving that increase already for thirty years and that the practice of the community had allowed him to do so. He asked Shāṭibī what he should do. Shāṭibī answered that he was not obliged to return the overpayment; what deserved consideration in this case was the morality of receiving such an increase, not whether the practice of the community allowed it or not.[59]

PROCEDURE

Shāṭibī was asked about the legal nature of *lawth* (incomplete evidence leading to presumption of guilt in case of homicide), in a case where there was one eye witness of the murder and two witnesses of the culprit's confession. According to Mālikī law the requirements of proof in such a case are the following:

(i) the confession of the culprit, and

(ii) two eye witnesses of the murder,

(iii) one witness on the basis of *qasāma* (declaration on oath by several persons), and

(iv) strong circumstantial presumptive evidence.[60]

The evidence in the above case did not fulfil the requirements completely, but it was evidence of presumption. Shāṭibī was asked whether it was *lawth*. He responded that *lawth* could be described as accepting weaker evidence that could prove harm. Accordingly, the evidence in this case would be regarded as *lawth*. Shāṭibī, however, explained that the difference of opinion among Mālikī jurists on the legal effectiveness of *lawth* is based, in fact, on the principle that the efficacy of *lawth* depends largely upon the discretion of the judge (*nāẓir al-qaḍiyya*)[61].

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CONCLUSION

To conclude this chapter we may recapitulate the above with reference to the questions that we raised in the beginning of this chapter. A fuller statistical analysis of the *fatāwā* is given in a tabulated form. Brief answers to the questions are attempted below.

The first question concerned the subject matter of Islamic law that was confronted by the impact of social change. Out of the 40 cases 34 implied social change. Among them the following categories are included:

(1) Theological matters   (2) Ritual anp worship
(3) Family   (4) Property
(5) Taxes   (6) Contracts and obligations

The second question concerned the adaptation to social change by the jurists.

Out of the 40 cases Shāṭibī accepted social change in 14 and rejected in 23.

The subject matters in which Shāṭibī rejected adaptation to social change most often were ritual and worship, family and trust. He showed flexibility with respect to theological matters and taxes. In contracts and obligations, he accepted and rejected cases almost equally, although he accepted adapatbility more often than he rejected it.

As to the third question, whether these changes were related to the general social conditions or not, it may be seen that out of 40 cases, 34 were related to such conditions; two cases of ritual and one case of procedure were not the result of such conditions, whereas the rest of the cases were posed by social changes.

The fourth question concerns the method of adaptation to or rejection of adaptation to social change by the jurists. Broadly speaking, in rejecting adaptation of law to several social changes two different principles

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Table : Social Change and Legal Theory

The following table shows, in detail, the attitude towards the adaptation to social changes in Shāṭibī's fatāwā.

Subject matter	Total number of cases	Those which imply social change — yes	Those which imply social change — n/a	Related to the general social conditions — yes	Related to the general social conditions — no	Related to the general social conditions — n/a	Shāṭibī's attitude — accepted	Shāṭibī's attitude — rejected	Shāṭibī's attitude — n/a	Acceptance Percentage (approx)
1. Exegesis	1	—	1	1	—	—	—	—	1	—
2. Theological matters	2	2	—	2	—	—	1	1	—	50%
3. Ritual and worship	12	11	1	10	2	—	1	11	—	8%
4. Family	5	3	2	3	—	2	—	3	2	—
5. Property	5	4	1	4	—	1	3	2	—	60%
6. Taxes	3	3	—	3	—	—	3	—	—	100%
7. Contract and obligation	11	11	—	11	—	—	6	5	—	55%
8. Procedure	1	—	1	—	1	—	—	1	—	—
TOTAL:	40	34	6	34	3	3	14	23	3	—
PERCENTAGE:	100	85	15	85	7.5	7.5	35	57.5	7.5	—

are invoked by Shāṭibī. In cases realting to theological matters, ritual
and worship, and trust he rejects adaptability of law to the social changes
by declaring these changes *bid'a* (innovations). It is obvious that these
matters particularly concern religion or relate primarily to a matter between
man and God. It is very important to note that Shāṭibī does not invoke
this principle in other matters. Apparently a social change affecting the
above mentioned subject matters implied, for Shāṭibī, the imposition of a
new obligation or the rejection of an earlier obligation in the name of religion.
This must have led him to an investigation of the philosophical question
of religious authority — to whom did it belong? An analysis of Shāṭibī's
concept of *bid'a* can provide us with an answer to this question in the parti-
cular context of our dissertation. To this we shall turn in subsequent
chapters.

The second principle employed in rejecting social change, especially
in cases of contracts and obligation, was that of 'unjust enrichments'
and 'risk'. This principle can be understood as the negative side of the
principles such as *tashīl* (convenience), *'adam ḥaraj* (removal of hardship)
and *maṣlaḥa* (public good) on the basis of which he accepts social changes
especially in matters of taxes and contracts. Whereas the latter served
public good positively, the former guarded it by opposing what is harmful
to public good.

The use of such general principles as *tashīl* and *maṣlaḥa* was pro-
mpted because of the failure or confusion of the regular methods of
interpretation usually employed by the jurists. Among such regular
methods the following were used in these *fatāwā* but found insufficient.

First is the method of analogy. This method is used in three ways:

(a) Seeking proximate analogy with a precedent that has some affi-
nity with the case in question.

(b) Seeking new analogy to refer to a precedent which was not
usually employed to make analogy. e.g. the production of
making cheese analogous to olive oil.

(c) To adjust the case in a way to suit the requirements of analogy.
As in the case of rearing silkworms, analogy was sought with
muzāra'a by restructuring the form of the contract. This
method of analogy forced the jurists to be casuistic, and even

then the results were not very satisfactory. Consequently,
they had to refer general principles.

Second was the method of abandoning strict adherence (*taqlīd*) to
Mālikī *fiqh* in order to borrow from other schools. This method, though
employed by other jurists, was rejected by Shāṭibī as it led to a diversity
of legal practices and also because it did not help to solve the problems.
The method still depended on analogy.

The third method which was used in contracts was to subdivide the
contract into different moments and parts so as to find suitable analogies
applicable to each.

In short the usual *fiqhī* methods generally proved to be insufficient to
meet the new changes, and, hence, the jurists turned to general principles.
An obvious result of such a trend was that more attention was paid to *uṣūl
al-fiqh* in order to investigate the foundations, objectives and purposes
of Islamic law.

Not only did lengthy discussion go on between various jurists about
such matters as *qiyās, ikhtilāf,* and the role of custom, but the question of
mashhūr madhhab and such subject matters were also discussed, indicating
the interest of the jurists in legal theory.

Another important factor stimulating the interest in legal theory
was the fact that the nature and form of contracts, which have a fundamen-
tal significance in every legal system were changing in that period. The
factor of labour, and especially of seasonal labour, had brought a new dim-
ension to the problem of wages. The new forms of contracts did not fit into
the old framework of agricultural contracts for lease of land. The *fuqahā'*
who still considered hired labour a *shirka fi'l-zar'* found contracts
considered in this way too complicated and too unjust to be convenient
for any of the parties.

The above analysis has revealed how the impact of social change was
felt in the *fatāwā* in this period. It has further shown that the older legal
concepts failed to answer the problems raised by the social changes. We
have also seen that because of this failure, Shāṭibī and other jurists resor-
ted to general principles such as *maṣlaḥa*. The failure of older legal
concepts and resort to general principles caused the jurists to reflect
on basic matters of legal theory.

Finally, the above analysis has shown that a change in method and substance of *fiqh* had taken place. Such a change logically called for a theoretical justification of the adaptation of law to social changes. Shāṭibī sought this justification in the principle of *maṣlaḥa* as we shall see in the following chapters. There were, however, certain theoretical and methodological objections raised by the jurists against using *maṣlaḥa* as a method of legal reasoning. These objections have been outlined in chapter four. Shāṭibī's analysis of *maṣlaḥa* cannot be fully understood without a general understanding of such objections.

As a general conclusion of this chapter we may point out that the underlying theme in Shāṭibī's *fatāwā* is the question of the morality and philosoply of law. With the exception of *'ibādāt*, in almost all the cases he gives more weight to human interest and public good than to the strict adherence to law. This teleological approach to legal obligations led him to investigate into the goals and objectives of Islamic law.

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NOTES

1. These *fatāwā* are recorded by Al-Wansharīsī, *Al-Mi'yār al-Mughrib 'an fatāwā 'ulamā' Ifrīqiya wa'l Andalus wa'l Maghrib* (Fas, 1314-1315 A.H.) at the following places:

   Vol. I, 22, 24, 229, 267, 267-68;

   Vol. II, 230, 401-403;

   Vol. III, 163;

   Vol. IV, 146;

   Vol. V, 17, 18, 19, 50-51, 186-189, 192;

   Vol. VI, 254-279;

   Vol. VII, 68-69, 70-74;

   Vol. VIII, 238;

   Vol IX, 163-165, 181, 478;

   Vol. XI, 31-37, 82-83, 87, 88-91, 96-98, 107-111;

   Vol. XII, 6, 7, 8, 11, 16, 19, 28, 201-211.

2. Lopez Ortiz, "Fatwas Granadinas de los siglos XIV y XV", *Al-Andalus*, VI (1941), pp. 85, 89, 93, 97, 102, 109, 114, 120, 123.

3. Caisiri, *Bibliotheca Arabica Hispana Escurialenisis*, I, 460/no: 1, 096. *vide* Lopez Ortiz, *op. cit.*

4. *Ḥadīth qudsī*, in distinction to the *ḥadīth nabawī*, represents those sayings of the Prophet in which the actual "word of God" is related by Muḥammad, whereas *ḥadīth nabawī* represents the sayings of the Prophet See *Shorter Encyclopedia of Islam*, article "Ḥadīth", 117.

5. *Al-Mi'yār*, Vol. XI, 96f.

6. *Ibid.*, Vol. II, 401-403.

7. F. Rahman, *Islamic Methodology in History* (Karachi, 1965), 166.

8. *Ibid.*

9. *Al-I'tiṣām*, Vol. II, 208ff. Rahman's reference to Shāṭibī (*al-I'tiṣām*, III, 178) needs to be corrected. According to our text of *al-I'tiṣām* the quotation is located at *Ibid.*, Vol. II, p. 251.

10. *Al-Mi'yār, op. cit.*, Vol. XI, 87.

11. *Ibid.*, Vol. I, 267.

12. *Ibid.*, Vol. XI, 31-33.

13. Most probably the practice of *ḥizb* was introduced into the Andalus by the Shā-dhiliyya. The most well-known *ḥizb al-baḥr*, which was supposed to be chanted while crossing the sea, is attributed to Abū'l Ḥasan al-Shādhilī. See D.B. MacDonald, "Ḥizb", *E.I.* (2nd ed.), Vol III, 513-14.

14. *Al-Mi'yār*, Vol. XI, 88.

15. *Ibid.*

16. *Ibid.*, see also above p. 108f.

17. *Ibid.*, 89.

18. *Ibid.*

19. *Ibid.*

20. *Ibid.*, Vol. I, 229.

21. *Al-I'tiṣām*, Vol. I, 207.

22. *Al-Mi'yār*, Vol. I, 267.

23. Ibn 'Arafa (d. 803 A.H.), *Ḥudūd Fiqhiyya*, vide Abū 'Abd Allāh Muḥammad al-Raṣā', *Sharḥ al-Ḥudūd al-Fiqhiyya* (Tunis, 1305 A.H.), 12-13.

24. The *fiqhī* conclusion on the prohibition of *khamr* is based on the following verses: 2:219; 5:90-91. "O you who believe, intoxicants (*khamr*) and games of chance are only an abomination of Satan's handiwork, so be ye away from it so that ye may be successful". The prohibition of *mayta* is based on the following verses: 2:173; 5:3; 16:115. "Verily He hath forbidden unto you what dieth of itself.."

25. *Al-Mi'yār*, Vol. I, 22.

26. *Ibid.*, Vol. I, 25.

27. *Ibid.*

28. *Ibid.*, 22.

29. *Ibid.*, 25.

30. *Ibid.*, Vol. IV, 146.

31. *Ibid.*, Vol. IX, 163.

32. *Ibid.*, Vol. IX, 478.

33. *Ibid.*, Vol. III, 163.

34. For the geographical description of the land see above p. 66.

35. *Al-Mi'yār*, Vol. VIII, 238.

36. *Ibid.*, Vol. VII, 74.

37. *Ibid.*

38. *Ibid.*, Vol. VII, 68.

39. Ibn 'Āṣim, *Tuḥfat al-Ḥukkām*....Ed. by L. Bercher. (Alger, 1958), 174. See also Bercher's note: 873, p. 386. ومن بيع ما عليه حسا   يرد مطلقا و مع علم أسا

40. *Al-Mi'yār*, Vol. VII, 70-74.

41. Lopez Ortiz, *op. cit.*, 97.

42. *Ibid.*, 85; *Nayl*, 49; *Mi'yār*, Vol. XI, 101-107.

43. *Al-Mudawwanat al-kubrā*, Vol. I, (Baghdād, 1970), 268. Saḥnūn asked Ibn Qāsim about a case where someone inherited certain merchandise, which he decided to sell; would there be *zakāt* on this merchandise. Ibn Qāsim said no, because:

لاتكون هذه السلعة للتجارة حتى بيبعها ، فاذا باعها استقبل بالثمن حولا من يوم باعها لانه يوم باعها صارت للتجارة .

On p. 294, Mālik states about *zakāt* on fruit as follows:

فليس فيها زكاة ولا فى اثمانها   على اثمانها الحول من يوم تقبض اثمانها

44. Lopez Ortiz, *op. cit.*, 97.

45. Udovitch, *Partnership and Profit in Medieval Islam* (Princeton, 1970), pp. 7f., 9, 10.

46. *Al-Mi'yār*, Vol. V, 186-187.

47. *Ibid.*, 19.

48. *Ibid.*, Vol. V, 192.

49. D. Santillana, *Istituzioni di dritto Musulmano Malichita*, Vol. II, (Rome, 1938), 306. See also *Mudawwana*, Vol. VI, 21.

50. Santillana, *loc. cit.*

51. Lopez Ortiz, *op. cit.*, 97.

Shāṭibī's *fatwā* is understood better in the context of the following two stipulations of *musāqāt*, mentioned by Ibn 'Āṣim

(i) و لا تصح [المساقاة] مع كراه..

(ii) والد فع للزكاة ان لم يشترط   بينهما بنسبة الجزء فقط

Ibn 'Āṣim, *Tuḥfa*, *op. cit.*, 162, 164.

52. Lopez Ortiz, *op. cit.*

53. *Ibid.*, 109.

54. *Al-Mi'yār*, *op. cit.*, Vol. V, 50.

55. *Ibid.*, 187.

56. Lopez Ortiz, *op. cit.*, 102.

57. *Al-Mi'yār*, *op. cit.*, Vol. VII, 68.

58. *Ibid.*, Vol. IX, 98.

59. *Ibid.*, Vol. VII, 74.

60. Ibn 'Āṣim, *op. cit.*, 226.

61. *Al-Mi'yār*, Vol. II, 230.

PART TWO

THE CONCEPT OF MAṢLAḤA
IN ISLAMIC JURISPRUDENCE

Chapters

THE CONCEPT OF MAṢLAḤA
BEFORE SHĀṬIBI

Shāṭibī's philosophy of Islamic law is, in fact, a continuation of the discussion of the concept of *maṣlaḥa* that had appeared in major works of *uṣūl al-fiqh* prior to Shāṭibī. This part therefore, aims at a historical and systematic analysis of the concept.

Etymologically the word *maṣlaḥa* is an infinitive noun of the root *ṣ-l-ḥ*. The verb *ṣaluḥa* is used to indicate when a thing or man becomes good, uncorrupted, right, just, virtuous, honest, or alternatively to indicate the state of possessing these virtues. When used with the preposition *li* it gives the meaning of suitability. *Maṣlaḥa* in its relational sense means a cause, a means, an occasion, or a goal which is good. It is also said of a thing, an affair or a piece of business which is conducive to good or that is for good. Its plural form is *maṣāliḥ*. *Mafsada* is its exact antonym. In Arab usage, it is said: *naẓara fī maṣāliḥ al-nās*, which means: "He considered the things that were for the good of the people." The sentence *fī'l-amr maṣlaḥa* is used to say: "In the affair there is that which is good [or cause of good]."[1]

In the Qur'ān various derivatives of the root *ṣ-l-ḥ* are used, the word *maṣlaḥa*, however, does not appear there. The Qur'ān uses *ẓalama* ('He did wrong') [V:39] and *fasada* ('He/it corrupted') [XXVI:125; XXVII: 142, II:220] as opposite terms to *ṣaluḥa*. *Ṣāliḥ*, the active participle of

ṣ-l-ḥ, occurs very frequently in the Qur'ān. On one occasion the meaning of this term is elaborated textually as follows:

> They believe in God and in the last day and enjoin goodness and forbid evil and hasten to do good deeds, and these are the *righteous ones* (*Ṣāliḥin*).[2]

Whereas it is clear that its use in the early period and in the Qur'ān was essentially related to the meanings of good and utility, there can be no doubt that the word had not become yet a technical term.

It is quite often claimed that *maṣlaḥa* as a principle of legal reasoning—broadly speaking, to argue that "good" is "lawful" and that "lawful" must be good—came to be used at a very early period in the development of *fiqh*. The use of this principle is attributed, for instance, to the early jurists of the 'Ancient schools of law' or even to the companions of the Prophet. Among the founders of the schools of law, it is associated with Mālik b. Anas. There seems, however, to be a confusion in these statements in equating the use of *maṣlaḥa* as a general term with its use as a technical term. The early use of *maṣlaḥa* may have been in its general sense similar to other terms such as *ra'y*. Rudi Paret has observed that the word *maṣlaḥa* as a technical term is not used by Mālik or Shāfi'ī; hence this concept must have developed in the post-Shāfi'ī period.[3]

Paret's observation, however, does not refute the possibility that considerations similar to *maṣlaḥa* were employed by pre-Shāfi'ī jurists. Such considerations do not seem to have been formulated in technical legal terms. The proponents of the use of *maṣlaḥa* in the early period have, apparently, confused the early similar considerations with *maṣlaḥa*. It is, therefore, not incorrect to say that the post-Shāfi'ī development of the concept of *maṣlaḥa* was a continuation of such early methods of reasoning as were not yet formally defined. Later, when Shāfi'ī's definition of the method of reasoning in terms of 'sources' and his insistence that the reasoning be linked with the revealed texts through *qiyās*, prevailed over other methods the concept and method of *maṣlaḥa* was also seen, especially by Shāfi'ī jurists in terms of 'sources'.

From Imām al-Ḥaramayn al-Juwaynī's (438/1047) *al-Burhān*, it appears that by his time the validity of reasoning on the basis of *maṣlaḥa* had become a problem controversial enough to bring forth three schools of thought in this respect. Some Shāfi'īs and a number of *mutakallimūn* are claimed to have maintained that the acceptable *maṣlaḥa* is only

that which has a specific textual basis (*aṣl*). The *mursala* (a *maṣlaḥa* not based on such an *aṣl*) and such as are contradictory to the textual evidence (*dalīl*) are not valid. The second school of thought is attributed to Shāfi'ī and to the majority of Ḥanafīs in general. They believe that *maṣlaḥa*, even if it is not supported on a specific basis, can still be used, provided that it is similar to those *maṣāliḥ* which are unanimously accepted or which are textually established. The third school is attributed to Mālik who held that a *maṣlaḥa* was abided by without any consideration of the condition of similarity or whether it corresponded with the texts or not.[4]

This comment by Juwaynī does not help us in determining the dates of the use of *maṣlaḥa* but it is very significant to note what divides these schools on *maṣlaḥa*. First the comment shows that the method of reasoning on the basis of *maṣlaḥa* was different from another method of reasoning which sought its basis in the revealed texts. Secondly if we accept the attribution of *maṣlaḥa* to the names of the jurists given in this comment, it also shows that the method of *maṣlaḥa* in its early formulation by Mālik and his followers was independent of the consideration of 'sources' or 'bases' and further that *maṣlaḥa* was accepted by ohers if it conformed to 'sources'—to the text in the case of the first group and to *ijmā'* in the case of the second group. They rejected only *al-maṣlaḥa al-mursala* because it did not conform with the sources. This explains why the concept of *maṣlaḥa* which originally was not necessarily conceived and confined within the framework of 'sources', came to be seen, particularly by later Shāfi'īs, in reference to 'sources'. This confused the discussion of the concept of *maṣlaḥa* as we shall see at a later moment. One indication of this confusion that may be noticed in the following analysis, is the tendency to discuss *maṣlaḥa* at two levels, i.e. first in terms of need and effectiveness, and second in reference to sources. When talked about in terms of validity these two levels were confused.

Juwaynī analysed *maṣlaḥa*, as an extratextual basis of reasoning in the context of analogy by *'illa* into five categories. First is the category where its *ma'nā* (significance) is rationally understandable and where it is related to certain essential necessities (*ḍarūra*) which are inevitable. The second category concerns what is a general need (*al-ḥājat al-'āmma*), but below the level of *ḍarūrī*. Third is the category which belongs to neither of the above, but rather concerns something which is noble (*mukarrama*). The fourth category is similar to the third, yet, in terms of priorities, the fourth comes later. The fifth category concerns those *uṣūl*

whose *ma'nā* (significance) is not obvious, and is not demanded by *ḍarūra*, nor by *ḥāja*; nor is it required by a *mukarrama*. Examples of this category are the purely physical *'ibādāt*.[5]

Maṣlaḥa as a technical term is not used in the Ẓāhirī jurist Ibn Ḥazm's (456/1065) *al-Iḥkām fī uṣūl al-aḥkām*, or in Ḥanafī jurist, Pazdawī's (d. 482/1089) *Uṣūl*.

The terms *maṣlaḥa* and *maṣāliḥ* are used by the Mu'tazilī Abū'l Ḥusayn al-Baṣrī (d. 478/1085) both in a general sense and in technical terms. To him *maṣāliḥ* are good things, and *maṣlaḥa* means goodness. Baṣrī discusses *maṣlaḥa* in reference to *istidlāl* (reasoning) and *'illa* (reason), and in arguments against his opponents who maintain that *maṣāliḥ* cannot be known through reasoning at all. At one point he defines *al-maṣāliḥ al-shar'iyya* as those acts which we are obliged to do by the *sharī'a* such as the *'ibādāt*.[6] Related to these acts are the means to achieving the *shar'ī* commands; these means are also connected with *maṣāliḥ*. These means are *dalīl*, *'amāra*, *sabab*, *'illa*, and *sharṭ*. The illustrations of these terms are given respectively as follows: the validity of consensus, analogy, measurability for *ribā*, the conditions in contracts of sale. All of these means are connected with *maṣlaḥa*.[7] For instance, the connection of *amāra* and *'illa* is evident in what follows:

> When a correct sign (*amāra*) indicates (*dallat*) a quality (*waṣf*) being reason (*'illa*) we decide that it is the basis of *maṣlaḥa*... It indicates that the basis of *maṣlaḥa* is to be found wherever an *'illa* is found.[8]

For Baṣrī, then, *maṣlaḥa* is an end for which *'illa* and other related terms are means. Baṣrī, however, does not elaborate what these *maṣāliḥ* are and what the connection is between *al-maṣāliḥ al-shar'iyya* which he mentions, and the other *maṣāliḥ* which he does not mention.

In the following centuries, however, the concept of *maṣlaḥa* advanced quite significantly. There are two main stages in the development of this concept before Shāṭibī. One is represented by Ghazālī in the early twelfth century, the other by Rāzī in the early thirteenth century.

In Ghazālī's *al-Mustaṣfā*, the problem of *maṣlaḥa* is discussed more clearly and fully than by Baṣrī.

Ghazālī defines *maṣlaḥa* as follows:

> In its essential meaning (*aṣlan*) it [*maṣlaḥa*] is an expression for seeking something useful (*manfa'a*) o ͟ removing something harmful (*maḍarra*).

But this is not what we mean, because seeking utility and removing harm are the purposes (*maqāṣid*) at which the creation (*khalq*) aims and the goodness (*salāḥ*) of creation consists in realizing their goals (*maqāṣid*). What we mean by *maṣlaḥa* is the preservation of the *maqṣūd* (objective) of the law (*Shar'*) which consists of five things: preservation of religion, of life, of reason, of descendents and of property. What assures the preservation of these five principles (*uṣūl*) is *maṣlaḥa* and whatever fails to preserve them is *mafasda* and its removal is *maṣlaḥa*.[9]

Maṣlaḥa as understood in the above definition is then divided into the following three categories. First, the type of *maṣlaḥa* which has a textual evidence in favour of its consideration. Second is the type which is denied by a textual evidence. The third is the type where there is neither a textual evidence in favour, nor in contradiction. The first category is valid and can be the basis for *qiyās*.[10] The second is obviously forbidden. It is the third category which needs further consideration. Accordingly, the element of *maṣlaḥa* contained in the third category is further examined from the viewpoint of its strength (*quwwa*). From this angle there are three grades of *maṣlaḥa*: *ḍarūrāt*, *ḥājāt*, *taḥsīnāt* or *tazyīnāt*. The preservation of the above-mentioned five principles is covered in the grade of *ḍarūrāt*. This is the strongest kind of *maṣlaḥa*. The second grade consists of those *maṣāliḥ* and *munāsabāt* which are not essential in themselves but are necessary to realize the *maṣāliḥ* in general. The third grade is neither of the above but exists only for the refinement of things.[11]

Keeping this classification in mind, only that *al-maṣlaḥa al-mursala* i.e. that which is not supported by textual evidence, will be accepted which has three qualities: *ḍarūra*, *qaṭ'iyya*, *kulliyya*. Ghazālī illustrates the point with an example:

> If unbelievers shield themselves with a group of Muslim captives, to attack this shield means killing innocent Muslims—a case which is not supported by textual evidence. If Muslim attack is withheld, the unbelievers advance and conquer the territory of Islam. In this case it is permissible to argue that even if Muslims do not attack, the lives of the Muslim capatives are not safe. The unbelievers, once they conquer the territory, will rout out all Muslims. If such is the case, then it is necessary to save the whole of the Muslim Community rather than to save a part of it. This would be the reasoning which is acceptable, as it refers to the above three qualifications. It is *ḍarūrī* because it consists of preserving one of the five principles, i.e. protection of life. It is *qaṭ'ī* because it is definitely known that this way the lives of the Muslim community will be safe. It is *kullī*, because it takes into consideration the whole of the community, not a part of it.[12]

The other two grades of *maṣāliḥ*, however, are not admissible if they are not supported by a specific textual evidence. If these are supported by the text, the reasoning is then called *qiyās*, otherwise, it is called *istiṣlāḥ* which is similar to *istiḥsān*,[13] and, hence invalid.

Ghazālī counts *istiṣlāḥ* along with *istiḥsān* among the methods of reasoning which do not have the same validity that *qiyās* has. He calls such methods "*uṣūl mawhūma*" — those principles in which the *mujtahid* relies on imagination or on his discretion rather than on the tradition.[14]

The above definition and classification of *maṣlaḥa* have a particular place in Ghazālī's structure of the discussion of *uṣūl al-fiqh*. A brief analysis of this structure will reveal the place that Ghazālī gave to the concept of *maṣlaḥa*. Ghazālī divides the discussion of *uṣūl* in al-Mustaṣfā into six parts. Apart from the first two parts which deal with introductory matters such as definition of *uṣūl* and an introduction to methods of logic, the remainder of the four parts discusses the following subject matters of *uṣūl*: *ḥukm* (command); *'adilla arba'a*, the four evidences, i.e. Qur'ān, sunna, *ijmā'* and *'aql*; method of reasoning (*istithmār*), i.e. interpretation and analogy; and *taqlīd* and *ijtihād*. The above treatment of *maṣlaḥa* appears as an annex to the discussion of the four evidences, where he argues that *maṣlaḥa* is not one of the four reliable evidences.[15] Also it is significant that it is not discussed in the part dealing with methods of interpretation and analogy, although its connection is implied.

References to *maṣlaḥa*, however, appear in other parts also. In the part on *ḥukm*, where Ghazālī discusses its essential meaning (*ḥaqīqa*) and its four components, *maṣlaḥa* is mentioned occasionally. The four components of *ḥukm*, according to Ghazālī are the following: (1) *ḥākim* (the one who gives judgment; the legislator, sovereign); (2) *ḥukm* (the judgment); (3) *maḥkūm 'alayh* (subject of command, *mukallaf*); (4) *maḥkm fīh* (the object of command, the act [of *mukallaf*]).

Discussing the meaning of *ḥukm*, he deals with the question of whether the goodness or badness of acts (both human and divine) is known objectively or through *shar'*. His description of *ḥasan* is similar to his above definition of *maṣlaḥa* in its essential meaning.[16] At one point he even uses the term *maṣāliḥ* in place of *ḥasan*.[17] He frequently refers to *mafsada* in the course of his analysis of *maḥkūm fīh*, in dealing with the question whether only voluntary acts are objects of command or not. He

regards it a *mafsada* if involuntary acts are also considered as objects of command.[18]

Reference to *maṣlaḥa* is made again in the part on methods of reasoning. Dealing with the method of *qiyās* (analogy), he explains that *qiyās* has four components: (1) *aṣl*, the root to which analogy is made; (2) *far'* the branch for which analogy is sought; (3) *'illa*, the reason on the basis of which analogy is made; (4) *ḥukm*, the judgment to which the analogy leads. Ghazālī clarifies that *qiyās*, here, must be distinguished from *qiyās* in philosophy. This distinction lies, apart from the difference in the form of reasoning, in the conception of *'illa* itself. The *'illa* in *fiqh* is not 'cause' but merely a 'sign'.[19] Naturally then the methods of finding the *'illa* are also different. The evidence in which the *'illa* is sought is *naqliyya* (traditional), meaning the Qur'ān, *Sunna* and *ijmā'*. The *'illa* is either explicit (*ṣarīḥ*), or it is implicitly indicated (*īmā*), or it is known from the sequence and order of the command (*sabab* and *tartīb*). The fourth manner of finding the *'illa* is *instinbāṭ* (inference). The only valid methods of *istinbāṭ* are two: (1) *al-sabr wa'l-taqsīm* (observation and classification; method of exclusion), and (2) *munāsaba* (affinity).[20] It is in reference to *munāsaba* that *maṣlaḥa* as a main element of affinity with *shar'* is frequently discussed.

Ghazālī defines *munāsib* as "that which, like *maṣāliḥ*, becomes regulated (is achieved rationally: *intaẓama*) as soon as it is connected with the command (*ḥukm*)".[21] For a discussion of the meaning, classification and grades of *munāsib*, Ghazālī refers to the annex which is significantly enough the discussion of *maṣlaḥa* and its grades.

Munāsaba and *maṣlaḥa* are, however, not identical. Although Ghazālī analyzes *munāsib* also in terms of effectiveness and validity in the same way as he does with *maṣlaḥa*, yet the details vary. Among the various classifications of *munāsib*, one is of particular significance for us, as it explains the relationship of *munāsib* to *maṣlaḥa* as well as the difference between *istiḥsān* and *istiṣlāḥ* in the eyes of Ghazālī. *Munāsib* is divided into four categories: first, the *munāsib* which is sutiable to and is supported by a specific textual evidence. Second that *munāsib* which is neither suitable to nor is supporetd by the textual evidence. Third, that *munāsib* which is not suitable to but is supported by textual evidence. Fourth, that *munāsib* which is suitable to but not supported by textual evidence.[22] Ghazālī adds that in the above classification the first category is acceptable to all

jurists. The second category is called *istiḥsān* which clearly means to make law according to personal discretion. The fourth is called *istiṣlāḥ* or *al-istidlāl al-mursal*. It is clear from this classification that *maslaḥa* is the basic consideration for deciding the suitability or *munāsaba* of something which *istiḥsān* lacks. But again the *munāsaba* of *maslaḥa* further depends on its suitability or conformity to the text in general; otherwise it will fall into the category of *istiḥsān*.

From Ghazālī's treatment of *maslaḥa*, it can be concluded in general, that his predilection for theologization of *fiqh*[23] and for *qiyās* as a method of reasoning, led him to examine the concept of *maslaḥa* with reservations. From the point of view of theology, he rejected the conception of *maslaḥa* in terms of human utility; furthermore, he subjected it to scrutiny on the basis of revealed texts. Secondly, he made the method of reasoning by *maslaḥa* subordinate to *qiyās*. He did not reject *maslaḥa* altogether, as he did with *istiḥsān*, but the qualification he provided for the acceptance of *maslaḥa*, did not allow it to remain an independent principle of reasoning.

Furthermore, with the above limitations on the concept of *maslaḥa*, he could not bring into focus the other elements which are in his discussion quite relevant to *maslaḥa*, such as *taklīf*, *ḥaqīqat al-ḥukm*, *fahm al-khiṭāb*, *niyya*, *ta'abbud*, etc. The discussions of these elements are scattered through various chapters in his *al-Mustaṣfā*. Also, he did not see the necessary relationship among different categories of *maslaḥa*.

Some of the above points were taken into consideration by some jurists after Ghazālī, but more systematic consideration was given them by Shāṭibī, as we shall see later.

Ghazālī's classification and definition was followed by a number of jurists. At least according to the channel of the *usūl* works that is mostly known to us, Ghazālī's influence, particularly in reference to *maslaḥa*, is very strong. As Ibn Khaldūn noticed, Baṣrī's book *al-Mu'tamad* and Ghazālī's *al-Mustaṣfā* remained a major source of influence for later writers on *usūl*, until the appearance of Rāzī's monumental work *al-Maḥṣūl*.[24]

Al-Maḥṣūl combined the above two works and reformulated a number of concepts. Rāzī's *Maḥṣūl* then in turn became a source of considerable influence for later *usūl* works. This influence is evident from the number of commentaries and abridgements on *al-Maḥṣūl* that were

written in later periods. This work influenced even Mālikī and Ḥanafī *usūl* which had so far taken exception to Shāfi'ī influence. We need not go into details, but it must be mentioned that Qarāfī (684/1285), Ibn Ḥājib (646/1249) and Ibn 'Abd al-Salām, with whom Shāṭibī was familiar and in general opposed, were largely under the influence of Fakhr al-Dīn al-Rāzī's (606/1209) *Maḥṣūl*.

Rāzī's *Maḥṣūl*[25] is structured more on the pattern of Baṣrī's *al-Mu'tamad* than on Ghazālī's *al-Mustaṣfā*. Rāzī deals with the definitions of the basic terms in the introduction. Significantly enough, the discussion about the meaning and classification of *ḥukm* and the question of the goodness of acts constitute more than half of this chapter. The scheme of the rest of the chapter is exactly the same as that of Baṣrī. The references to *maslaḥa* are made, therefore, in the introduction, where the question of the goodness of acts is discussed, in the chapter concerning *qiyās* where the question of *munāsaba* as a manner of finding *'illa* is dealt with, and in the last chapter where *al-maṣāliḥ al-mursala* are discussed as one of the ways of knowing the commands of the *sharī'a* in addition to *qiyās*.

Rāzī does not define *maslaḥa* but it seems that in his thinking *munāsib* and *maslaḥa* are quite closely associated with each other. He gives two definitions of *munāsib*. First, *munāsib* is defined as "what leads man to what is agreeable (*yuwāfiq*) to him both in "acquisition" (*taḥṣīl*) and "preservation" (*ibqā'*)."[26] He explains that *taḥṣīl* means to seek "utility" (*manfa'a*), and *manfa'a* is pleasure (*ladhdha*) or its means. *Ladhdha* is to achieve what is suited (*mulā'im*). *Ibqā'* is explained similarly as removing harm (*maḍarra*), which is *'alam* (pain) or its means. Both *ladhdha* and *'alam* are evident and cannot be defined. Thus *munāsib* in its final analysis is related to *ladhdha* in the positive sense and to *'alam* in the negative sense.

The second definition of *munāsib* is given as that which is usually suited (*fi'l 'āda*) to the actions of the wise.[27]

Rāzī then clarifies that the first definition is accepted by those who attribute *ḥikam* and *maṣāliḥ* as causes or motives to God's commands. The second definition is employed by those who do not accept the above causality.[28] This explanation takes us back to Rāzī's own view on the problem of causality and God's commands. This question is first dealt with in the course of discussion whether the goodness or badness of things is rational or established by *Shar'*. He argues that in as much as the defini-

tion and understanding of good as something "suited to nature (of man)", or as "a quality of perfection" is concerned, undoubtedly good and bad are rational. The point in question is, however, whether good and bad can be defined in reference to praise or blame as the *Mu'tazila* have done.[29] Rāzī, after detailed analysis, concludes that, if defined in the latter sense, good and bad can be established only by *Shar'*.[30] The question then is whether what is praised in God's commands corresponds with the rational good or not. If it corresponds, can this correspondence be understood as cause or motive?

Rāzī answers this question in detail in his discussion of *munāsaba* as a manner of *'illa*. He argues that to prove that *manāsaba* can be *'illa*, there are three premises to be established: first, that God issued the commands for the *maṣāliḥ* of the people; second, that the case in question consists of a *maṣlaḥa*, and third, that it can be shown that the probable reason for God's issuing this particular command is this particular *maṣlaḥa*.[31] Giving six proofs, he establishes the first premise that the commands are issued because of *maṣāliḥ*. He explains, however, that in contradiction to the *Mu'tazila* the *fuqahā'* do not regard *maṣlaḥa* as *gharaḍ* (personal motive); they rather view it in terms of *ma'nā* (significance) or *ḥikma* (rationale). In fact, here is not much difference between the two positions. The difference is as follows: whereas the *Mu'tazila* believe that God is obliged to consider *maṣlaḥa*, the *fuqahā'* stress that He is not obliged to do so. God has done so because of His grace.[32] The second premise needs no explanation. The third premise, that this particular command attributes a specific motive to God's acts and Commands, is a position which Rāzī does not accept.[33] Rāzī resolves this problem by explaining it in the following terms:

> Muslims believe that the revolving of the heavens, the rising and the setting of the stars, the continuity of their forms and the lights are not obligatory, yet it has been God's custom to continue them in one state. Inevitably it provides the probability that this [i.e. what happens today] will continue tomorrow and after tomorrow with the same qualities... To sum up, if a certain thing occurs repeatedly many times, it gives the probability that when it happens [next] it will happen the same way... Now, when we observe *Sharā'i'*, we find that the commands and *maṣāliḥ* occur together, without being separated from each other, this is known inductively... [34]

To sum up, Rāzī stresses that no motive or cause can be attributed to God's acts or commands; yet he admits that God's commands are for the *maṣlaḥa* of the people, and this *maṣlaḥa* or *munāsaba* can be considered

'illa for that command. The paradox in this position is resolved by two explanations; first, that these *maṣāliḥ* are coincidental with God's acts, only accidentally, not in terms of cause and effect and, secondly, that it has happened this way not as a necessary correlation between *maṣlaḥa* and command, because God is not obliged to act this way. Rather, God has acted as He has as a Grace, so that a sign may be established to make His Command known.

Rāzī has offered these explanations in view of the possible objections against his admission of *ta'līl af'āl Allāh*, (to attribute causes to God's acts). It is significant to note that Rāzī recounts the possible criticism of his position in lengthy detail while his own defense is very short and quite unsatisfactory. The criticism consists of more than ten objections.[35]

Rāzī's answer to this criticism is very brief. Two main points in his answer are as follows:

> We have explained that God's commands are issued (*mashrū'a*) because of the *maṣāliḥ*. As to the rational arguments that you have enumerated, they are not applicable here (*ghayr masmū'a*). Because if they are established they would infringe upon the legal obligation (*taklīf*), whereas the controversy over analogy (*qiyās*), whether in favour or in opposition, is based on the acceptance of the obligation. This well-considered answer suffices all what you have mentioned.[36]

> Secondly, your criticism applies to those "who maintain that to attribute *maṣāliḥ* as *'illa* to God's commands is rationally necessary. It is not applicable to the one who holds that it is not obligatory for God but He has done so because of His Grace.[37]

Thus Rāzī could maintain that *munāsaba* or *maṣlaḥa* were evidences for *'illa*, and could still insist that God's commands had no motives. It is with this reservation that Rāzī apparently accepted the first definition of *munāsib*. This is also the reason that he divides *munāsib* into two categories: *ḥaqīqī* (true) and *iqnā'ī* (apparent). *Ḥaqīqī* is that *munāsib* which consists of either a *maṣlaḥa* in this world or one in the hereafter. *Iqnā'ī* only appears to be a *munāsib*; in fact it is not.[38]

Like Ghazālī, Rāzī also divides *maṣlaḥa* into *ḍarūrī*, *ḥājī* and *taḥsīnī*. He divides *munāsib* according to *ta'thīr* and *shahādat al-shar'* (textual evidence), and *mulā'ama*.[39] With the exception of certain differences of detail, he is generally in agreement with Ghazālī.

In general, the attempt at theologizing the concept of *maslaha* by Ghazālī was completed by Rāzī with much more emphasis. Ghazālī objected that a conception of *maslaha* in reference to human utility alone and independent of God's determination, is not theologically possible. Rāzī gave this general objection a specific theological content. He made it clear that even to attribute the consideration of *maslaha* in terms of human utility to God's commands, is to attribute causality to His acts and hence theologically impossible. Both of these positions led to a kind of *ijbār* (determinism).[40] Both implied that God's commands demand obedience in their own right, not because of *maslaha*. If there existed the content of *maslaha* in *sharī'a*, it was to be explained by the grace of God or by accident, as Rāzī held. These positions rendered the question of moral and legal responsibility meaningless. Rāzī admitted such implications of his position for the question of *taklīf* as well as for the problem of reasoning by analogy, but he did not elaborate it further.

Briefly, the concept of *maslaha* which was originally a general method of decision for jurists and as such a free principle, came to be limited by the opponents of this concept through two considerations. First, there was theological determinism which tended to define *maslaha* as whatever God commands. Second, there was a methodological determinism which, aiming to avoid the apparent arbitrariness of the method, tried to subject *maslaha* to *qiyās* so as to link it with some more definite basis. Both considerations were inadequate. First, in order to decide that something is *maslaha*, even to say that God's commands are based on *maslaha*, some criterion outside these commands has inevitably to be accepted. This was precisely what theological determinism denied. Second, to proceed by *qiyās*, one must seek the *'illa*, which was either denied because of theological reasons or was interpreted so as to mean "sign". The implications of this position are obvious. On the one hand, it insisted that further extension of rules must be in units; every new deduction must have a specific link in *Sharī'a*. It denied the extension of law as a whole. On the other hand, it refused to take social needs into consideration, because it insisted upon deducing laws from specific rulings of *Sharī'a*, not even from the general intent of the law.

If we may take general note of major works on *usūl* during the period between Rāzī and Shāṭibī, we can see in these works four trends. The first trend refers to those whose conception of *maslaha* is either domi-

nantly similar to that of Rāzī or who have simply juxtaposed Ghazālī's and Rāzī's definitions of *munāsib* and *maslaha*. Among Mālikī jurists Shihāb al-Dīn al-Qarāfī (684/1285)[41], and among Ḥanafīs Ṣadr al-Sharī'a al-Maḥbūbī (747/1346)[42], stay closer to Rāzī. Accepting Rāzī's criticism of *maslaha*, Qarāfī even went further. He raised serious doubts whether *maslaha* could ever be defined and justified in clear terms.[43]

Jamāl al-Dīn al-Isnawī (771/1370)[44] and Tāj al-Dīn al-Subkī (771/1369)[45] combine Ghazālī and Rāzī. Sa'd al-Dīn al-Taftāzānī (792/1290)[46] interprets the Ḥanafī position, mainly that of Pazdawī (482/1089), in reference to Rāzī.

The second trend refers to those jurists who reject *al-maslaha al-mursala* as a valid basis of reasoning. In this category fall the Shāfi'ī jurist Sayf al-Dīn al-'Āmidī (631/1234)[47] and the Mālikī, Ibn Ḥājib (646/1249).[48] In their arguments against *al-maslaha al-mursala* both follow Ghazālī rather than Rāzī. To them a *maslaha* is acceptable only if it is textually supported.

The third trend is illustrated by the Shāfi'ī jurist, 'Izz al-Din Ibn 'Abd al-Salām (660/1263). He was inclined towards *tasawwuf*.[49] There is a noticeable inclination towards ṣūfistic interpretation of law in his treatment of the concept of *maslaha*. This needs a detailed observation.

To Ibn 'Abd al-Salām *maslaha* means *ladhdha* (pleasure) and *farah* (happiness) and the means leading to them.[50] The *masālih* are then divided into two kinds, *masālih* of this world and the *masālih* of the hereafter. The former can be known by reason, while the latter can only be known by *naql* (tradition, revelation).[51] In view of the people's knowledge, however, the *masālih* differ according to the level of the approach of the people. The lowest level of *masālih* is that which is common to all men. Higher than this is the level on which the *adhkiyā'* (the wise people) conceive the *masālih*. The highest level is peculiar to the *awliyā Allāh* (friends of God, ṣūfīs) alone. The *awliyā'* and *asfiyā* prefer the *masālih* of the hereafter to those of this world. "The reason is that the *awliyā'* are anxious to know His commands and laws [in their reality], hence their investigation and reasoning (*ijtihād*) is the most complete one".[52]

Elsewhere, Ibn 'Abd al-Salām divides *masālih* as "rights" into two major divisions. First are the Rights of God, and second, the Rights of men. The Rights of God fall into three categories: rights which belong

purely to God such as *ma'ārif* (gnosticism) and *aḥwāl* (mystic states); second, rights which combine rights of God and those of men such as Zakāt; and third, those which combine rights of God, and of His Prophet, and of the people in general. The rights of men are also of three categories; rights of *nafs* (self), rights of men toward each other, and rights of animals toward men.[53]

The above references which are recurrent themes in his *Qawā'id al-aḥkām*, indicate that Ibn 'Abd al-Salām's legal thinking was deeply influenced by the mysticism. For instance, he did not reject *ḥuqūq al-nafs*, but a *maṣlaḥa* aiming at the realization of such rights was lower in rank than one which aimed at *ma'rifa* and *aḥwāl*.

In fact, Ibn 'Abd al-Salām represents the stage where the Ṣūfī conception of *maṣāliḥ* came to permeate *uṣūl al-fiqh*. It is not possible at this point to go into details of the ṣūfī conception of human *maṣāliḥ* and its history. It must, however, be pointed out that at a very early stage in ṣūfism, rejection of *ḥuẓūẓ al-nafs* (pleasures of the animal soul) became significant as a means of controlling the *nafs*. In Sarrāj's (378 A.H.) *al-Luma'*, *ḥuẓūẓ al-nafs* are frequently opposed to *ḥuqūq al-nafs*.[54] *Zuhd* is defined as abandoning the *ḥuẓūẓ*.[55] The *ḥuqūq* are defined as *aḥwāl*, *maqāmāt*, *ma'ārif*, etc.[56]

Ḥuẓūẓ had its apparent connection with *maṣāliḥ*, and more particularly, with the question of *rukhṣa* (legal allowance) in case of hardship. The Ṣūfī stress on *zuhd*, *wara'* and *ikhlāṣ* required abandoning of *ḥuẓūẓ*. An obvious example of this encroachment of *taṣawwuf* on *fiqh* and *uṣūl al-fiqh* may be seen in Qushayrī's *waṣiyya* (will) to his disciples where he advised them against opting for such allowances because "when a *faqīr* falls down from the level of *ḥaqīqa* to that of *rukhṣa* of Sharī'a, he dissolves his covenant with God and violates the mutual bond between him and God."[57]

Closer to the period of Shāṭibī, the opposition to *ḥuẓūẓ* appears still stronger. Abu'l-Ḥasan al-Shādhilī (656 A.H.) with whom Ibn 'Abd al-Salām's connections are claimed,[58] used to define *tawḥīd* (unification) in terms of abandoning the *ḥuẓūẓ al-nafs*.[59] He also explained it as a curse from God when someone is found indulging in the *ḥuẓūẓ* so to be barred from *'ubūdiyya* (servitude).[60]

Ibn Abbād al-Rundī (792/1390), the famous Shādhilī, with whom Shāṭibī was in correspondence on matters relating to *taṣawwuf* and *fiqh*, also

stressed the rejection of *ḥuẓūẓ*. Commenting on the *Ḥikam* of Ibn 'Aṭā Allāh, Ibn 'Abbād said that "the *nafs* always seeks *ḥuẓūẓ* and runs away form *ḥuqūq*; hence if you are confused in two matters, always choose what is harder for the *nafs*".[61] Elsewhere, commenting on the *ḥikma*: "The coming of *fāqāt* (trial by wants and needs) is a happy occasion for the disciples", Ibn Abbād explained that the Ṣūfī, contrary to a common Muslim, finds pleasure by losing his *ḥuẓūẓ*. Situations of neediness provide a disciple with purity of heart, which is not achieved by *ṣawm* (fasting) or *ṣalāt* (praying), because in *ṣawm* and *ṣalāt* there is a possibility of *hawā* (desire) and *shahwa* (lust).[62]

The Ṣūfī view of obligation to God, thus, had serious implications for *maṣlaḥa* in terms of human utility. It not only denied human interest as a basis of consideration, but also insisted on abandoning human interests to purify the obligations as "complete obedience to God". These implications were not generally recognized by the jurists. Ibn 'Abd al-Salām accepted the Ṣūfī view, but in his attempt at synthesis between the two he was led either to deny the *maṣāliḥ* of this world altogether, or to accept the two on separate grounds.[63]

The fourth trend is represented by Ibn Taymiyya (728/1328) and Ibn Qayyim al-Jawziyya (751/1350). Ibn Taymiyya tried to find a middle way between the two extremes of total rejection and total acceptance of *maṣlaḥa*. He considered *al-maṣlaḥa al-mursala* similar to the methods of *ra'y*, *istiḥsān*, *kashf* (mystic revelation) and *dhawq* (mystic taste) of whose validity he was suspicious,[64] and hence rejected them. On the other hand, he refuted the moral implications of the denial of *maṣlaḥa* to the commands of God.

Ibn Taymiyya also counts *al-maṣlaḥa al-mursala* as one of the seven ways of knowing the commands of God, along with the traditional sources of law. He defines *al-maṣlaḥa al-mursala* as follows:

> [It is a decision] when a *mujtahid* considers that a particular act seeks a utility which is preferable, and there is nothing in *shar'* that opposes this [consideration].[65]

Ibn Taymiyya, however, concludes that to argue on the basis of *al-maṣlaḥa al-mursala* is to legislate in matters of religion, and God has not permitted this. To do so is similar to *istiḥsān* and *taḥsīn 'aqlī*.[66]. He admits that *Sharī'a* is not opposed to *maṣlaḥa*, but when human reason

finds *maṣlaḥa* in a certain case where there is no supporting citation in the text to be found, only two things are meant. Either there definitely is a text which the observer does not know or one is not dealing with a *maṣlaḥa* at all.[67] The obvious assumption in Ibn Taymiyya's arguments is that all the possible *maṣāliḥ* are already given in the Text. The other assumption is, of course, that all of God's commands are based on *maṣlaḥa*. The latter assumption is of particular significance to Ibn Taymiyya, as it has to do with the moral responsibility of man, a matter which he stressed very much. He condemned both the Mu'tazila and the Jabriyya in reference to the question of *maṣlaḥa*. The Mu'tazila argued that God is obliged to command only what is good for man. They conceived God's actions as analogous to man's actions. They assumed that whatever is morally obligatory for man must be obligatory for God. Ibn Taymiyya refuted this. But he also refuted the Jabriyya position that God's commands are not based on *maṣlaḥa*. He questioned their assumption that the intention of *maṣlaḥa* is a limitation upon God's acts. The Jabriyya argued that a command does not necessitate will (*irāda*). Ibn Taymiyya saw in this argumnt a theological advantage, but morally such a doctrine was harmful. Ibn Taymiyya, therefore, set out to analyse this generally-accepted doctrine. He clarified that in reference to God there are two kinds of wills (*irāda*), *al-irāda al-shar'iyya al-dīniyya* (the legal and the religious will) and *al-irāda al-qadriyya al-kawniyya* (the potentive creative will.) When God commands, He wills the first kind of will.[68]

The consideration of *maṣlaḥa*, or as Ibn Qayyim , following Ibn Taymiyya, often calls it, *siyāsa*, plays an important part in explaining legal obligations, legal reasoning and legal change in Ibn Qayyim's *I'lām al-muwaqqi'īn*. He expounds the principles of Ḥanbalī *fiqh*, and enumerates the following five as sources and principles: (1) *Nuṣūṣ*, (2) the *Fatāwā* of the companions of the Prophet, (3) selection from the opinion of the companions, (4) *al-ḥadīth al-mursal* (a report of a saying of the Prophet which lacks a link in the chain going back to the Prophet.), (5) *Qiyās l'il-ḍarūra*.[69] Thus it is in reference to the three sources that the consideration of *maṣlaḥa* is expounded. Ibn Qayyim explains that it is valid to attribute *'illa* to the commands of God, because the Qur'ān and the *Sunna* of the Prophet themselves are replete with examples where reasons are given to explain the command.[70] The larger part of the *I'lām* is devoted to illustrating how various commands are based on certain reasons which he calls *ḥikma* or *maṣlaḥa*.

The following passage contains a clear statement of his views on *maṣlaḥa*. In a chapter where he explains how "*fatāwā* may change according to the change in time and place, etc...", he says:

> This chapter is of great significance. Due to the ignorance of the matters [to be discussed in this chapter] grave errors have been committed in reference to *Sharī'a*. As a result hardship and severity has been brought forth [upon people]. Such obligations have been imposed as are not required, if one judges by the magnificent *Sharī'a* which keeps the highest level of *maṣāliḥ*. The foundations of *Sharī'a* are laid on the *ḥikam* and *maṣāliḥ al-'ibād*, in this world of living (*ma'āsh*) and in the world of return (*ma'ād*). The *Sharī'a* is all justice, kindness, *maṣāliḥ* and *ḥikma*. Hence any case which departs from justice to injustice... from *maṣlaḥa* to *mafsada* ... is not part of *Sharī'a* even though it has entered there by *ta'wīl* (literal interpretation).[71]

The fifth trend is illustrated by Najm al-Dīn al-Ṭūfī (716/1316). He justified the use of *maṣlaḥa* even to the extent of setting aside the text. He stressed *maṣlaḥa* as the basic and overriding principle of *Sharī'a*. *Maṣlaḥa*, therefore, prevails over all other methods such as *ijmā'*.[72] Ṭūfī regards *maṣlaḥa* as a fundamental principle.

Ṭūfī's preference of *maṣlaḥa* over against texts and *ijmā'* was also prompted by his belief that textual sources as well as the opinions on which *ijmā'* is claimed were diverse, inconsistent and often self-contradictory. The principle of *maṣlaḥa* provided a consistent method of decision.[73] Ṭūfī, however, did not elaborate on a concrete criterion of *maṣāliḥ*, how they are to be decided, especially in a case where there is a question of choosing among more than one *maṣlaḥa*. He goes on to the extreme of suggesting a decision by drawing of lots.[74]

Ṭūfī's weakness in developing the concept of *maṣlaḥa* as a fundamental principle of reasoning lies in the fact that in final analysis he too regarded *maṣlaḥa* in the perspective of 'four traditional sources'. For him recourse to *maṣlaḥa* was necessary only after the traditional sources had failed.

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CONCLUSION

As a problem of legal theory the question of adaptability to social change has been a controversial one in the history of *uṣūl al-fiqh*. The *qāḍī*s in the early courts of law, particularly in the Umawī period, relied mostly on *ra'y* (considered opinion). The use of *ra'y* generally amounted to a general consideration of human needs. The *ra'y* was, thus a method that kept the then institution of law adaptable to social change.

There, however, existed an opposition to *ra'y* among the scholars who specialized in *ḥadīth* and in local practice. These scholars considered the use of *ra'y* as an arbitrary and therefore unreliable method of making a decision. The diversity of laws that resulted from the exercise of *ra'y* by the *qāḍī*s in various cities increased the number of opponents to the use of *ra'y*.

The general attitude of the *Ḥadīth* group was to adhere strictly to the Qur'ān and *sunna* (of the Prophet as well as that of his companions), and thus to reject any idea of the adaptability of Islamic law. This attitude was motivated by the religious apprehension of distortion of Islamic tradition by the use of *ra'y*. This attitude was, however, impossible to maintain in view of the enormous degree of social changes that had taken place in Islamic society by the end of the eighth century.

The literal provisions of the Qur'ān and *sunna* were insufficient to accomodate the growing number of social changes. Even the method of extending these provisions by accepting the *ijmā'* (consensus) of the past generation of scholars on certain matters failed to meet the demand of accommodation. The need to accommodate the changes could not be denied, but how to extend the limited legal provisions to adapt to these changes.

The method of *qiyās* (analogy) developed as an answer to the need of the adaptability of Islamic law. Even among the *ḥadīth* group, a large number of scholars recognized this need and accepted the validity of the method of *qiyās* for this purpose. The religious and theological implications of the attitude of the *Ḥadīth* group, however, spelled out the same fear

of arbitrariness for the method of *qiyās* as it had done for *ra'y*. Consequently, the Zāhirīs who still adhered to the older trend of rejecting anything beyond the literal provisions, opposed the use of *qiyās* and departed from the mainstream of the *Ḥadīth* group.

Although initially a method of adaptability, yet in reaction to the Zāhirī and similar criticism, *qiyās* was soon ushered into the protection of strict formality. It was sought as a foolproof corrective of the method of *ra'y*. To remove the fear of arbitrariness, *qiyās* was connected with the "sources"—the Qur'ān and *Ḥadīth*. The appeal of this method was so strong that it overshadowed its opposition as well as any other methodological developments in Islamic legal theory.

Nevertheless, the method of *ra'y* was not completely swept away by *qiyās*. Trends similar to the use of *ra'y* survived in the form of principles such as *istiḥsān, istiṣlāḥ, ḍarūra, munāsaba,* etc. Incidentally, rules derived from these principles constitute the basis of a considerable part of Islamic law (*fiqh*)—probably even more than those based on *qiyās*.

The *qiyās* which was the basis of a number of other methods in extending or adapting legal doctrines to social changes, was itself hampered by at least two limitations. One was the attitude of formalism which required that in order to be conclusive, the analogy must be derived explicitly from the original sources (Qur'ān, *Sunna* or *ijmā'* of the early generations). In other words, the basis of analogy must be explicitly expressed as a "cause" or "reason" for the original ruling. This attitude discouraged the use of implicit cause in the original ruling as a basis of analogy. Also this attitude required reference to specific original rulings rather than encouraging the search for, and the application of, general principles or the intent and "spirit" of the law in original rulings.

The second limitation, which further strengthened the attitude of formalism, stemmed from the theological view of the problem of causality in reference to the attributes of God. The Ash'arīs opposed the idea of there being any causality behind God's actions and speech. Thus, since the command of God, being one of His acts, cannot have any cause or motive, the entire method of *qiyās* came to be suspected as wrongly or arbitrarily seeking to appoint causes for the commands of God.

One of the major consequences of the above limitations—i.e. formalism and denial of causality—was that the discussion on the problem of

social change and legal theory became essentially a question of inference from the "sources of law".

To escape this dilemma, the Ẓāhirīs rejected *qiyās* altogether. The Shāfi'īs, who did not entirely reject *qiyās*, imposed limitations on its application. They rejected any method of reasoning or any form of *qiyās* which was not linked with certain specific rulings in the Qur'ān or *Sunna*. Nevertheless, they could not deny the occurrence of social changes, nor could they refuse to accept these changes in practice. They had, therefore, to adopt methods such as *istiṣḥāb* (presumption of continuity of a legal evidence) to justify these changes. Ḥanafīs and Mālikīs employed certain methods which did not strictly adhere to the requirements of the theory of the sources of law, principally methods of *qiyās*. Two such methods are *istiḥsān* (to decide in favour of something which is considered *ḥasan*, good, by the jurist, over against the conclusion that may have been reached by *qiyās*), attributed to Ḥanafīs, and *istiṣlāḥ* (to decide in favour of something because it is considered *maṣlaḥa*, more beneficial, than any alternative rule decided on another basis). These methods were not accepted by all the schools. Yet the concept of *istiḥsān* and *istiṣlāḥ* have in common the consideration of human good. Invariably the underlying principle in the reasoning of these schools was to favour the adaptability of Islamic law to social changes.

In order to render the concept of *maṣlaḥa* suited to their legal philosophy, the Shāfi'ī jurists imposed upon this concept the approach of the "sources of law". They divided *maṣlaḥa* into categories according to its basis in the sources. If *maṣlaḥa* accorded with the sources, it was not disputable, since it was somehow justifiable as a method of *qiyās*, when it was literally derived from the sources. The only category which was questionable was that which was not based on the sources. This category was called *al-maṣlaḥa al-mursala*. Naturally for the Shāfi'ī jurists the only discussion of *maṣlaḥa* that mattered was discussion of *al-maṣlaḥa al-mursala*. This view came to dominate in other schools, and even Mālikīs eventually accepted it.

The significant consequence of the above categorization of *maṣlaḥa* was that the original idea of *maṣlaḥa* as a principal independent source came to be disregarded, and *istiṣlāḥ* came to be equated with *al-maṣlaḥa al-mursala*. Recent studies related to *maṣlaḥa* which are discussed in the following chapter also betray this traditional outlook.

To conclude, the concept of *maṣlaḥa* with its simple beginnings unfolded its various aspects as it came into contact with theology, *taṣawwuf*, logical analysis and, most significantly, with social and legal changes. Theological determinism introduced by Ash'arī jurists appears largely in the discussion of *taklīf*. To Ash'arīs, obligation is created by divine command. The Mu'tazila refuted this sense of theological determinism. They differentiated between two senses of obligation: *taklīf* and *wujūb*, the latter was rational and ethical, while the former was theological.[75] In other words, mere command does not oblige man to act; it only informs him. What obliges man is the knowledge of good and bad, or of useful and harmful. Commenting on this position, G.F. Hourani concludes that this interpretation should have been acceptable to the legal concept of obligation. Yet there were certain complexities. First, if legal obligation is based on one's knowledge of utility, it may lead to arbitrariness, and furthermore this criterion in its absolute sense is not universally applicable. All the things which are apparently useful also have certain elements which are harmful either to the person concerned or to others. Second, all the rules of *Sharī'a* do not conform to the rule of utility; there are obvious hardships and disadvantages in obeying them. Third, to preserve an order and a system the decision of utility cannot be left to the individual. Who should then decide?

Still another aspect of the relationship of *maṣlaḥa* and *taklīf* was brought forth by ṣūfīs. The consideration of seeking utility and avoiding harm leads one to view obligation in a formal sense. Whenever there is a choice between hard and soft, a *maṣlaḥa*-oriented person chooses the latter. Not only that, to avoid harm to himself, one seeks devices which are legal; and since he is a utility seeker, he feels satisfied by escaping the full implications of legal obligation. To ṣūfīs, this attitude, even in its lawful aspects, was quite opposite to the meaning of obligation towards God. They opposed this attitude as *ḥuẓūẓ* of *nafs* (lower soul) who is one of the enemies of the traveller on the path of God.

Shāṭibī tried to find an anwer to the above theological, moral and ṣūfī questions. He concentrated on the concept of *maṣlaḥa* itself, in contrast to other jurists who focussed on *al-maṣlaḥa al-mursala*. At a point where Shāṭibī rejects the connection of the method of reasoning by *maṣlaḥa* with *bid'a* we find an elaborate discussion of why and how he did not agree with the general understanding of the term *al-maṣlaḥa al-mursala* by other jurists.[76] To this we will turn in subsequent chapters.

NOTES

1. See Lane, *An Arabic-English Lexicon*, Book IV (London: Williams Norgate, 1863-93), pp. 1714-1715.

2. The Qur'ān: III, 114. Rāghib al-Iṣfahānī, *Al-Mufradāt fī gharīb al-Qur'ān* (Karachi: Tijārat Kutub, 1961), p. 286, also confirms that in the Qur'ān *Ṣalāḥ* is often opposed to *fasād* and *sayyi'a*.

3. R. Paret, "Istiḥsān and Istiṣlāḥ" *Shorter Encyclopedia of Islam* (Leiden: Brill, 1961), p. 185.

4. Al-Juwaynī, *al-Burhān fī uṣūl al-fiqh*. MS. III Ahmet 1321, photo. I.R.I. no: 219, fol. 135a; see also Muṣṭafā al-Shalabī, *Ta'līl al-aḥkām* ... (Cairo: Azhar, 1949), pp. 292ff.

5. *Ibid.*, fols. 108ff.

6. Abu'l Ḥusayn al-Baṣrī, *al-Mu'tamad fī uṣūl al-fiqh*, Vol. II (Dimashq: al-Ma'had al-Ilmī al-Firansī, 1964), p. 888.

7. *Ibid.*

8. Ibid., p. 805.

9. Ghazālī, *al-Mustaṣfā min 'ilm al-uṣūl*, Vol. I (Baghdād: Muthannā, 1970), pp. 286-87.

10. *Ibid.*, p. 284.

11. *Ibid.*, p. 290.

12. *Ibid.*, pp. 294-295.

13. *Ibid.*, Vol. II, p. 306.

14. *Ibid.*, Vol. I, pp. 274, 284. Following Shāfi'ī, Ghazālī says:

من استصلح فقد شرع ، كما ان من استحسن فقد شرع (p. 315.)

15. *Ibid.*, Vol. I, pp. 284-315.

16. Ibid., pp. 56-57.

17. *Ibid.*, p. 60.

18. Ibid., p .87.

19. *Ibid.*, Vol. II, p. 230.

20. *Ibid.*, Vol. II, pp. 295ff.

21. *Ibid.*, p. 297.

22. *Ibid.*, Vol. II, p. 306.

23. *Ibid.*, Vol. I, pp. 5-7. Ghazālī complains that the Transoxian jurists, such as Abū Zayd have tried to bring too much *fiqh* into *uṣūl al-fiqh*. (p. 10).

24. Ibn Khaldūn, *Muqaddima* (Cairo: Būlāq, 1320 A.H.), p. 431.

25. Fakhr al-Dīn al-Rāzī, *al-Maḥṣūl fī uṣūl al-fiqh*, MS. Yale University, Nemoy, A-1039 (L-643).

26. *Ibid.*, part II, f. 87a.

27. *Ibid.*

28. *Ibid.*

29. *Ibid.*, part I, f. 9a.

30. *Ibid.*, f. 13a.

31. *Ibid.*, part II, f. 90b.

32. *Ibid.*, f. 91b.

33. *Ibid.*, f. 92a.

34. *Ibid.*, f. 92b.

35. *Ibid.*, ff. 92-97.

36. *Ibid.*, f. 97b.

37. *Ibid.*

38. *Ibid.*, f. 88b.

39. *Ibid.*, ff. 87-90.

40. Most probably this is the *ijbār* to which Shāṭibī refers. See below p. 205.

41. Qarāfī, *Tanqīḥ al-fuṣūl fī 'ilm al-uṣūl*, in *Al-Dhakhīra* (Cairo: Maṭba' Kulliya al-Sharī'a, 1961), pp. 144-46.

42. Ṣadr al-Sharī'a al-Maḥbūbī, *al-Tawḍīḥ wa'l-tanqīḥ*, Vol. II (Cairo: Maṭba' Bosanawī, 1304 A.H.), pp. 536-540.

43. See below p. 235.

44. Jamāl al-Dīn al-Isnawī, *Nihāyat al-su'l*, commentary on Bayḍāwī's *Minhāj al-wuṣūl*, on the margin of Ibn Amīr al-Ḥājj, *al-Taqrīr wa'l-taḥbīr* (Cairo: Būlāq, 1317 A.H.), Vol. III, pp. 134-140.

45. Tāj al-Dīn al-Subkī, *Jam' al-jawāmi'*, in 'Abd al-Raḥmān al-Bannānī, *Ḥāshiya ... 'alā matn jam' al-jawāmi'*, Vol. II, (Cairo: Muṣṭafā Bābī, 1937), pp. 270-285.

46. Sa'd al-Dīn al-Taftāzānī, *Sharḥ al-tawḍīḥ wa'l-tanqīḥ* (Cairo: Bosanawī, 1304 A.H.), Vol. II, pp. 548-683.

47. Sayf al-Dīn al-Āmidī, *al-Iḥkām fī uṣūl al-aḥkām*, Vol. IV (Cairo: Maṭba' Ma'ārif, 1914), p. 215-217.

48. Ibn Ḥājib, *Mukhtaṣar muntahā al-uṣūlī*, Vol. II (Cairo: Būlāq, 1317 A.H.), p. 289.

49. Ibn 'Abd al-Salām was initiated into the Suhrawardiya Ṭarīqa. He is also claimed to have joined the Shādhiliyya. His relationship with Ibn 'Arabī has, however, been a subject of dispute. For details see Riḍwān 'Alī Nadwī, *Al-'Izz b. 'Abd al-Salām* (Damascus: Dār al-fikr, 1960), pp. 103-110.

50. Ibn 'Abd al-Salām, *Qawā'id al-aḥkām fī maṣāliḥ al-anām*, Vol. 1 (Cairo: Istiqāma, n.d.), p. 10.

51. *Ibid.*, p. 6.

52. *Ibid.*, p. 24.

53. *Ibid.*, p. 129.

54. R.A. Nicholson (Ed. Comm.), in Abū Naṣr al-Sarrāj, *Kitāb al-luma' fi'l-taṣawwuf* (London: Luzac, 1914), p. 134.
    For this opposition of terms cf.
    Abū Bakr al-Kalābādhī, *al-Ta'arruf li madhhab ahl al-taṣawwuf* (Cairo: 'Īsā al-Bābī, 1960), p. 23.
    Najm al-Dīn Kubrā, *Fawā'iḥ al-jamāl*, ed. Fritz Meier, (Wiesbaden: Steiner, 1957), p. 71 (Introduction), pp. 5-6 (Text).

55. Sarrāj, *op. cit.*, p. 47. (quoting Ṣūfī Ruwaym b. Aḥmad.)

56. *Ibid.*, p. 336.

57. Abū'l Qāsim al-Qushayrī, *al-Risāla fī 'ilm al-taṣawwuf* (Cairo: Muḥammad 'Alī, 1948), p. 181.

58. See above, n. 49.

59. 'Abd al-Ḥalīm Maḥmūd, *al-Madrasa al-shādhiliyya wa imāmuhā Abū'l Ḥasan al-Shādhilī* (Cairo: Dār al-Kutub al-Ḥadītha, 1387 A.H.) p. 130.

60. *Ibid.*, p. 137.

61. Ibn 'Abbād al-Rundī, *Sharḥ al-ḥikam l'il-Imām Abī'l-Faḍl Aḥmad b. Aṭā' Allāh al-Iskandarī* (Cairo: Muṣṭafā Āfandī, 1320 A.H.), p. 99.

62. *Ibid.*, p. 106.

63. Also see p. 236.

64. Ibn Taymiyya, *Qā'ida fi'l mu'jizāt wa'l karāmāt wa anwā' khawāriq al-'ādāt* in *Majmū'at al-rasā'il wa'l masā'il*, Vol. V (Cairo: Maṭba' Manār, 1349 A.H.), p.22.

65. *Ibid.*

66. *Ibid.*, p. 23.

67. *Ibid.*

68. *Ibid.*, p. 30.

69. Ibn Qayyim, *I'lām al-muwaqqi'īn*, Vol. I (Cairo: Sa'āda, 1955), pp. 29-32.

70. *Ibid.*, pp. 197ff.

71. *Ibid.*, Vol. III, p. 14.

72. Najm al-Dīn al-Ṭūfī, *Sharḥ al-arba'īn*, included as appendix to Muṣṭafā Zayd, *al-Maṣlaḥa fi'l-tashrī' al-islāmī wa Najm al-Dīn al-Ṭūfī* (Cairo: Dār al-fikr al-'Arabī, 1954), p. 18.

73. *Ibid.*, pp. 35-37.

74. *Ibid.*, p. 47.

75. G.F. Hourani, *Islamic Rationalism, The Ethics of 'Abd al-Jabbār* (Oxford: Clarendon, 1971), pp. 57, 115, 118.

76. Shāṭibī, *al-I'tiṣām* (Cairo, 1332 A.H.), Vol. II, pp. 95-140.

CHAPTER FIVE

MAṢLAḤA IN
·   ·
MODERN TIMES

In modern times the concept of *maṣlaḥa* underwent still further formulations. With the expansion of the magnitude of social change affecting all departments of life utilitarian philosophies became popular. The movements of modernism in Islam searched in Islamic tradition for a principle that would help them grapple with the changing conditions. They found in *maṣlaḥa* such a concept. Naturally therefore more attention has been paid to the study of this concept in modern times than ever before. In order to study the continuity of the concept we will now turn to a brief survey of the studies of this concept in recent times.

In 1857 the *'Ahd al-Amān*, a document of reforms in Tunisian law, was issued. This document later became the fundamental legal instrument in the 1860 Constitution — "the first Constitution to be issued in any Muslim country in modern times".[1] In its preamble, *maṣlaḥa* was referred to as the principle of interpretation of law: "God... who has given justice as a guarantee of the preservation of order in this world, and has given the revelation of law in accordance with human interests [*maṣāliḥ*]²". The document then expounded the following three principles as the components of the concept of *maṣlaḥa*: "Liberty, security, equality".[3]

In 1867 Khayr al-Dīn Pasha, in his *Aqwam al-masālik*, reaffirmed that the principle of *maṣlaḥa* must be the supreme guide of the government.[4]

He found this principle extremely significant as it could be used to justify a change of institutions in the interest of the public as well as to condemn a change when it opposed public interest.[5]

In 1899, in his speech on the reforms in the court systems in Egypt and the Sudan, Muḥammad ʿAbduh also stressed the use of *maṣlaḥa* as a guiding principle in law making.[6]   J. Schacht has argued that the principle of *maṣlaḥa*, according to ʿAbduh, was preferable to the literal application of Islamic law.[7]   Henry Laoust has also observed that the principle of *maṣlaḥa* was one of the two ideas on the basis of which ʿAbduh considered Islam to be superior to Christianity. It is because of this principle that Islam has a sense of reality more developed than Christianity.[8]

It is to be noted that Khayr al-Dīn and ʿAbduh both referred to *maṣlaḥa* as a principle of interpretation of law — and as such a principle of change, dynamism and adaptability.

The same theme, in varying versions, has been repeated by a large number of modern Muslim scholars of Islamic law. Among them the following are notable illustrations: Rashīd Riḍā, Ṣubḥī Maḥmaṣānī, ʿAbd al-Razzāq al-Sanhūrī, Maʿrūf al-Dawālibī, Muṣṭafā al-Shalabī, ʿAbd al-Wahhāb Khallāf, Muḥammad al-Khuḍrī and Muṣṭafā Abū Zayd.[9]

In 1906, *al-Manār* published Najm al-Dīn al-Ṭūfī's treatise on *maṣāliḥ*. Ṭūfī, a Ḥanbalī jurist, sometimes also considered a Shīʿī, represented radical views on *maṣlaḥa*. For example, he held that the principle of *maṣlaḥa* could even restrict (*takhṣīṣ*) the application of *ijmāʿ* as well as that of the Qurʾān and *Sunna* if the latter were harmful to human interests. This publication raised a strong reaction among the conservative group of scholars in Egypt. Consequently Ṭūfī as well as the concept of *maṣlaḥa* was bitterly opposed. Only to illustrate this opposition, we quote Zāhid al-Kawtharī's criticism of Ṭūfī as follows:

> One of their spurious methods in attempting to change the *Sharʿ* in accordance with their desires is to state that 'the basic principle of legislation in such matters as relating to transactions among men is the principle of *maṣlaḥa*; if the text (*naṣṣ*) opposes this *maṣlaḥa*, the text should be abandoned and *maṣlaḥa* should be followed'. What an evil to utter such statements, and to make it a basis for the construction of a new *Sharʿ*!
>
> This is nothing but an attempt to violate divine law (*al-Sharʿ al-Ilāhī*) in order to permit in the name of *maṣlaḥa* what the *Sharʿ* has forbidden. Ask this libertine (*al-fājir*) what is this *maṣlaḥa* on which you want to

> construct your law?... The first person to open this gate of evil... was Najm al-Ṭūfī al-Ḥanbalī... No Muslim has ever uttered such a statement ... This is a naked heresy. Whoever listens to such talk, he partakes of nothing of knowledge or religion.[10]

Kawtharī did not deny the fact that the *Sharʿ* took into consideration the interests and good of the people, but he insisted on that what is good and what is bad can only be known through revelation. *Maṣlaḥa* as an independent principle for the interpretation of law has, therefore, no validity whatsoever.

Kawtharī's criticism of *maṣlaḥa* is typical of the traditional view of the concept. To him *maṣlaḥa* is arbitrary and merely personal. In fact this fear of arbitrariness concerning the reasoning on the basis of regard for human interests, and hence considered to be the violation of Divine law is a familiar feature in the history of the Islamic legal theory. *Maṣlaḥa* and similar legal principles which were employed in favour of the adaptability of Islamic law, were opposed on the same grounds.

Recent studies on *maṣlaḥa* can be generally divided into two groups. First, there are studies dealing with *al-maṣlaḥa al-mursala* and *istiṣlāḥ* and, second, those dealing with *maṣlaḥa* as such. The focus in the first group of studies is not on *maṣlaḥa* proper but on *al-maṣlaḥa al-mursala*, yet it is significant to note that for them *istiṣlāḥ* is in no way different from *al-maṣlaḥa al-mursala*.

Ignaz Goldziher compared *istiṣlāḥ* with *istiḥsān* saying that the latter is a Ḥanafī principle according to which a decision reached by analogy can be dismissed when the legislator finds that this decision opposes a certain matter which he believes is useful. That is to say that *istiḥsān* removes the rigidity of law depending upon the discretion of an individual jurist. *Istiṣlāḥ*, on the other hand, depends upon a rather objective method; it removes the rigidity of law in consideration of general human "interests" (*maṣlaḥa*) which are sufficiently defined. He also suggests that *istiṣlāḥ* partially resembles the Roman legal principle of *utilitum publicum* as well as Rabbinic law.[11]

N.P. Aghnides and G.H. Bousquet also refer to *istiṣlāḥ* in the same sense. Aghnides defines it as a principle that consists in recommending a thing because it serves a useful purpose, although there is no express evidence in the revealed sources to support such action.[12] Bousquet's defini-

tion is as follows: "*Istiṣlāḥ* consists of discarding by exceptional disposition the rules deduced by *qiyās* in cases where the application of general rules would lead to illogical, unjust and undesirable results.[13]

J. Schacht's treatment of *maṣlaḥa* is not much different from that of the above scholars. He described *istiṣlāḥ* as a special form of analogy, or rather a type of *istiḥsān* used by early Mālikī scholars and which later came to be called *istiṣlāḥ*.[14] Schacht re-emphasises that *istiṣlāḥ* is identical with the Roman legal principles of *utilitas publica* which characterises *jus honorarium*.[15]

R. Paret also finds *istiṣlāḥ* to be connected with *istiḥsān*, but the former is more limited and definite as it replaces a general principle such as "finding good", by a rather specific principle, such as "according to the demand of human welfare (*maṣlaḥa*)". *Maṣlaḥa* thus is the material principle underlying *istiṣlāḥ* which is a method of reasoning. In actual details where Paret traces the history of *istiṣlāḥ*, he specifically refers to *al-maṣlaḥa al-mursala*, rather than *maṣlaḥa* as such. This is why he finds nothing of much importance after Ghazālī had theorized about *istiṣlāḥ*. His references to *uṣūl* are confined to the discussions of *al-maṣlaḥa al-mursala*.[16]

Analysing the treatment of *maṣlaḥa* by modern Muslim scholars such as 'Abduh and others, A. Hourani criticised their use of *maṣlaḥa* in a utilitarian sense. He argued that such an interpretation of *maṣlaḥa* was not justified; "for the traditional thought, *maṣlaḥa* had been a subordinate principle, a guide in the process of reasoning by analogy rather than a substitute for it".[17]

Von Grunebaum, in his study of the concept of reason in Muslim ethics, concluded that *istiṣlāḥ* (the public interest) is unmistakably one point at which human "reason" is permitted to impinge on traditional or systematic considerations that would normally be viewed as the determining factors of *shar'ī* developments.[18]

Although all of the above opinions agree in regarding *maṣlaḥa* as a principle that removes rigidity and that suggests adaptability to changes based on human needs, yet according to the same writers, its function is restricted to exceptional cases or to the use of a special form of analogy. The reasons for such a limited view of *maṣlaḥa* in these studies is either that they have studied only *al-maṣlaḥa al-mursala* to the exclusion of

other aspects of *maṣlaḥa* or that they have equated *al-maṣlaḥa al-mursala* with *maṣlaḥa*.

There are, however, a few studies which evince an integral approach to the problem of *maṣlaḥa* or which study the concept of *maṣlaḥa* as such. Among such studies, the following four are relevant to our point. G.F. Hourani has examined *maṣlaḥa* as an ethical concept. M.H. Kerr and Saʻīd Ramaḍān al-Būṭī have analyzed it in particular reference to legal theory. E. Tyan has studied it as a principle of methodology.

Tyan describes *maṣlaḥa* as 'general interest', 'social utility' and 'good' and has defined *istiṣlāḥ* as "to recognize a rule as useful".[19] He distinguishes two conceptions of *istiṣlāḥ*. In the original conception of *istiṣlāḥ*, the interests (*maṣāliḥ*) were divided into three categories according to its recognition by the law, the last category being *al-maṣāliḥ al-mursala*. The directing principles in this kind of research consisted essentially in considering the elements of social utility (*maṣlaḥa*) and of affinity (*munāsaba*). The speculation according to this conception of *istiṣlāḥ* remains within the limits of law.

The other conception of *istiṣlāḥ* is more extensive.[20] According to this conception of *istiṣlāḥ* "it may be admitted that this method can be employed not only in relation to matters which are not regulated by the precise texts of law, but also in those matters which have been subjected to such regulations, so much so that it be legitimate to make it prevail over precise rules or over conflicting or contradicting regulations, provided that, in the final analysis, they (the rules derived from this method of reasoning) remain in conformity with the objectives of law, i.e. they accord with the above-mentioned five major interests (religion, physical integrity, descendance, patrimony and mental faculty)".[21]

Tyan, thus, concluded that *istiṣlāḥ* "is a method of interpreting already existing rules by disengaging the spirit of these rules from the letter; exceptions and extensions are reached which command practical utility and correspond to the fundamental goals of the law".[22]

G.F. Hourani has studied *maṣlaḥa* as an ethical concept in medieval Islam.[23]

He observes that there were two theories of value in medieval Islam: one, that of objectivism, i.e. that the value has real existence; the second

theory of value was that of theistic subjectivism, that the values are determined by the will of God. The theory of objectivism was expounded by the Mu'tazila; the idea of rational good was called by them *hasan* or *maslaha*. The theory of thesitic subjectivism was maintained by the Ash'arīs. The opposition of these two theories manifested itself in the field of *fiqh* also. Jurists in the early period used certain methods which did not correspond with "theistic subjectivism". Principles such as *istihsān* and *istislāh* tended rather towards "objectivism". The ethical basis of these principles, however, remained unarticulated. The Mu'tazilī theory of rational good [that there is an objective good including a real public interest (*maslaha*) and a real justice (*'adl*), and that they could be recognized by human reason] could have provided a basis to support the above principles. But the theory of objectivism was superseded by theistic subjectivism. Why? Hourani suggests that, apart from religious and political factors that prevented objectivism from being adopted by the lawyers, the Mu'tazilī theory of objectivism had its own deficiencies. First it could not show how moral judgment operates. Second, it could not fill up the theoretical gap between means (moral and legal acts) and the end (the eternal happiness, which is the happiness in the world hereafter for Muslims).

On the other hand, the theory of theistic subjectivism corresponded with Shāfi'ī and Zāhirī views on legal reasoning, which opposed the use of *ra'y* and any judgment independent of the revelation. Shāfi'īs denied the objective value of idle fancy, *zann* and *hawā*. Theologically also the theory of objectivism appeared to curtail the omnipotence and omniscience of God, which the theory of theistic subjectivism promoted.

Hourani's study of *maslaha*, choronologically, is confined to the early period of Islamic tradition. Because of this limitation he could not take into consideration the development in the treatment of *maslaha* by later *usūliyyīn* such as Shāțibī. In fact, Hourani's criticism of objectivism is mainly ethical. The three deficiencies that he ascribed to *maslaha* as an objective value are not found in Shāțibī's conception of *maslaha* as a legal value.

Muhammad Sa'īd Ramadān al-Būṭī presented his doctoral dissertation, *Dawābit al-maslaha fī'l-sharī'at al-islāmiyya*, at Azhar University in 1965. In his introduction to the published edition of this dissertation Būṭī explains that the Orientalists, whom he regards as new crusaders

against Islam, have adopted a new measure to destroy Islam. They are urging Muslims to open the gate of *ijtihād*, and in order to accomplish this end they refer to the concept of *maslaha* as the fundamental principle of *sharī'a*. He is, however, convinced that the real motive behind this proposal for *ijtihād* is the destruction of Islam. He admits that the gate of *ijtihād* has never been closed and that the lawgiver has given full consideration to the principle of *maslaha*, but this principle has always been restricted with a number of qualifications.[24] After a detailed analysis of the etymology and concept of *maslaha*, he deduces the qualifications which the traditional jurists had suggested in the application of this principle. He also compares this concept with the concept of 'utility' and 'pleasure' in the philosophies of Stuart Mill and J. Bentham. He concludes that *Maslaha* in its unqualified sense is identical with the above concepts which he considers as purely hedonistic. The qualified concept of *maslaha*, however, contradistinguishes itself from utility and pleasure as it takes into consideration the followig three characteristics. First, it is not limited to this world only but equally includes the hereafter. Second, the Islamic value of good is not material. Third, the consideratin of religion dominates other considerations.[25] He has thus concluded that if these and other qualifications are disregarded "and the term *maslaha* alone is held up as a light post and a criterion, then upon my life! an *ijtihād* such as that will descend upon Muslims from all sides. [To prove such terrifying results after opening the gate of *ijtihād*] it suffices to observe the evil that brings the laws of *Sharī'a* out of the fortress of texts into the open, exposed to desires and arbitrary opinions that deceive (us) behind the name of *maslaha* and *manfa'a*."[26]

If Būṭī's expositions of *maslaha* and its qualifications are accepted, *maslaha*, as a matter of fact, becomes superfluous as a legal concept. The consideration of *maslaha* by the *Shāri'*, then only means that *maslaha* is what the *Shāri'* commands.

In other words, *maslaha* has no objective value. This is the logical conclusion from Būṭī's view of Islamic law accordng to which he rejects a distinction between this world and the hereafter. He does not separate *mu'āmalāt* from *'ibādāt* but rather considers the former part of the latter. He does not distinguish between *huqūq Allāh* and *huqūq al-'ibād*. In fact, his conception of Islamic law is that of *ta'abbud* (mere obedience). On all these points he is in disagreement even with the jurists who employ

the concept of *maṣlaḥa* in reference to human needs. His disagreement becomes paritcularly evident if his conclusions are compared with Shāṭibī's conception of *maṣlaḥa*.

Būṭī has frequently referred to Shāṭibī in his dissertation, but these references are selective and often out of the context. Būṭī's study fails to bring out the real significance of the concept of *maṣlaḥa* mainly because he has not given full consideration to the proponents of this concept such as Shāṭibī.

The same deficiency is found in M. Kerr's study of *maṣlaḥa*, which also offers a detailed analysis of the concept. Examining Rashīd Riḍā's legal doctrines, Kerr observed that the logical conclusion of Riḍā's arguments for the use of *maṣlaḥa* would be that it is something equal to natural law and that *istiṣlāḥ* does not depend on the texts and *qiyās*. Such conclusions, however, are not spelled out by Riḍā himself.[27] Why? According to Kerr, the failure to spell out the full implications of the argument has to do with the theological nature of Islamic law which influences even *maṣlaḥa*, theoretically the most liberal principle of legal interpretation in Islamic jurisprudence. The theological foundations of Islamic law insist on minimizing the part of human reason in the formulation of law.[28]

Before he goes into a detailed analysis of the concept of *maṣlaḥa* in traditional jurisprudence, Kerr clarifies two general aspects of Islamic law which, in turn, affect the function of *maṣlaḥa*. Firstly, Islamic law has its basis in revelation and thus is an expression of the will of God. Kerr refers to the theological differences between Ash'arīs and Mu'tazilīs about the will of God. In contrast to the Mu'tazila, Ash'arī denied freedom in man's acts. Consequently, the intellectual spirit and methods of Islamic jurisprudence "could not entirely escape the influence of the law's theological underpinnings, which proclaimed that reason is essentially irrelevant to the substance, determination and obligatory character of moral principles."[29]

The second aspect that affected *maṣlaḥa* was the emphasis on *qiyās*. According to Kerr, the method of *qiyās* itself is a means of protecting the authority of revelation.[30] In fact, the term *'illa* in jurisprudence is not applied in the usual sense of cause and effect. *'Illa* is not a value judgment, but only the attribute or the characteristics of the matter under consideration that gives rise to the judgment.[31] Further, the limita-

tions of the means to identify *'illa* are also confined to the use of indication within the text. *Munāsaba* (suitability) is the only means that goes beyond the indication of the texts. Kerr finds even *munāsaba* to be a conservative, circumscribed and timid acknowledgement of the place of social utility (*maṣlaḥa*) in God's commands. In fact, he concludes, in final analysis even *munāsaba* is subordinate to the indications of the text.[32]

Kerr, thus treats *maṣlaḥa* as one of the aspects of *munāsaba*. He also divided *maṣlaḥa* on the basis of the conformity to the sources, and thus it is only *al-maṣlaḥa al-mursala* which really needs to be discussed. According to him *al-maṣlaḥa al-mursala* is a form of *qiyās*, because whereas *qiyās* looks for the *'illa*, *al-maṣlaḥa al-mursala* seeks *ḥikma*, a more general *'illa*. Kerr concludes that because it is not based on a specific *'illa*, *istiṣlāḥ* has been a subsidiary and occasional technique of disputed validity.[33]

In final analysis Kerr comes to equate *maṣlaḥa* with *al-maṣlaḥa al-mursala*.

> The *maṣlaḥa* is therefore a more specific term for *ḥikma* and since it is known in each case not by direct indication in the textual source but by the jurist's own judgment, it is a *maṣlaḥa mursala*.[34]

Kerr also confines *maṣlaḥa* to its correspondence with the textual sources. It is noteworthy that Kerr, in his discussion, refers to such jurists as Ghazālī and Qarāfī who viewed *maṣlaḥa* in the above terms. He also discusses the views of Ibn Taymiyya, Ibn Qayyim and Ṭūfī whom he chose as proponents of the validity of *maṣlaḥa* as a principle of legal interpretation. But these jurists, too, regarded *maṣlaḥa* as subordinate to the textual sources and *qiyās*. The consideration of *maṣlaḥa*, according to them, would prevail over the texts and *qiyās* only when the latter are harmful to obey.

Kerr has not taken into account jurists such as Shāṭibī, who favour *maṣlaḥa* as an independent legal principle. The significance of studying Shāṭibī's views is evident from Tyan's analysis of *istiṣlāḥ* which gives a more integral picture of *maṣlaḥa*.

The absence of Shāṭibī from Kerr's analysis of *maṣlaḥa* is regrettable. According to Kerr, Rashīd Riḍā, whose views led Kerr to study the concept of *maṣlaḥa* in detail, characterises Shāṭibī "as exceptionally outspoken in his defence of *istiṣlāḥ*."[35]

It comes as a further surprise that Shāṭibī was not only disregarded but also suffered a sort of indifference when Kerr, probably following Paret, [36] confused him with Abū'l Qāsim al-Shāṭibī. [37]

To sum up, the present studies on *maṣlaḥa* generally present an unbalanced analysis of this concept. They have failed to see the real significance of this principle as it was conceived and employed by those jurists who viewed it as an independent principle. A study of Shāṭibī's concept of *maṣlaḥa* as already indicated by Tyan, can fill this gap.

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NOTES

1. Albert Hourani, *Arabic Thought in the Liberal Age*, 1798-1939 (London: Oxford, 1962), p. 65.

2. Muḥammad Bayrām, *Ṣafwat al-i'tibār*, Vol. II, p. 11, *vide* Hourani, *op. cit.* p. 64.

3. *Ibid.*

4. *Ibid.*, p. 92.

5. *Ibid.*, p. 93.

6. Muftī Muḥammad 'Abduh, "*Taqrīr muftī al-diyār al-Miṣriyya fī iṣlāḥ al-maḥākim al-Shar'iyya*", *al-Manār*, Vol. II (1899) p. 761.

7. Schacht, "Muḥammad 'Abduh", *Shorter Encyclopaedia of Islam*, (Leiden: Brill, 1961), p. 406.

8. Henry Laoust, *Le Califat dans la doctrine de Rašīd Riḍā*, (Beyrouth, 1938), p. 273, n. 61.

9. The following works by the authors enumerated below stress the dynamism of *maṣlaḥa* as a principle of interpretation of Islamic law:

   Rashīd Riḍā, *Yusr al-Islām* (Cairo: Nahḍa, 1956), pp. 72-75.

   Ṣubḥi Maḥmaṣānī, *Falsafat al-tashrī' fī al-Islām*, transl. by F.J. Ziyadah (Leiden: Brill, 1961). (Arabic Ed. Bayrūt, 1952), pp. 130-133, 205f.

   'Abd al-Razzāq Sanhūrī, "Wujūb tanqīḥ al-qānūn al-madanī al-Miṣrī", in *Majallat al-Qānūn wa'l Iqtiṣād*, Vol. 6 (1962) 3-144. *vide* Kerı, *op. cit.*
   Ma'rūf Dawālibī, *al-Madkhal ilā 'ilm uṣūl al-fiqh* (Bayrūt: Dār al-'ilm l'il-mala'īn, 1965), pp. 442-450.

   Muṣṭafā al-Shalabī, *Ta'līl al-aḥkām, 'arḍ wa taḥlīl li ṭarīqat al-ta'līl wa taṭawwurātihā fī 'uṣūr al-ijtihād wa'l-taqlīd* (Cairo: Azhar, 1949), pp. 278-384.

   'Abd al-Wahhāb Khallāf, *Maṣādir al-tashrī' al-islāmī fī mā lā naṣṣa fīhī*, (Cairo: Dār al-Kutub al-'Arabī, 1955), pp. 70-122.

   Muṣṭafā Zayd, *al-Maṣlaḥa fī al-tashrī' al-islāmī wa Najm al-Dīn al-Ṭūfī* (Cairo: Dār al-Fikr al-'Arabī, 1954).

   Muḥammad Khuḍrī, *Uṣūl al-fiqh* (Cairo: Muṣṭafā Muḥammad, 1933).

10. Zāhid al-Kawtharī, *Maqālāt al-Kawtharī*, posthumous publication in 1372 A.H., as quoted by Muṣṭafā Zayd, *op. cit.*, pp. 164-66.

11. Goldziher, "Das Prinzip des Istiṣḥāb in der Muhammedanischen Gesetzwissenschaft", *Wiener Zeitschrift für die Kunde des Morgenlandes*. Vol. I (1887), pp. 128-236; *vide* Summary in French by G.H. Bousquet, in *Arabica*, VII (1960), pp. 12-15. The points of resemblance with Roman and Rabbinic law are not elaborated but most probably Goldziher refers to certain areas of flexibility in contrast to the strict application of law.

12. N.P. Aghnides, *Mohammedan Theories of Finance* (London: Longman, 1916), p. 102.

13. G.H. Bousquet, *Précis de droit musulman* (Alger: Maison du Livre, 1947), p.37.

14. J. Schacht, *The Origins of Muhammadan Jurisprudence*, (Oxford: Clarendon, 1959), p. 111, n. 1.

15. Ibid, "Classicisme, traditionalisme et ankylose dans la loi religieuse de l'Islam", in *Classicisme et declin culturel dans l'histoire de l'Islam*, (ed.) Brunschvig et als (Paris: 1957), p. 158, note no. 4.

16. Rudi Paret, "*Istiḥsān and Istiṣlāḥ*", in *Shorter Encyclopaedia of Islam*, p. 185.

17 Albert Hourani, *op. cit.*, p. 234.

18. G.E. Von Grunebaum, "Concept and Function of Reason in Islamic Ethics". *Oriens*, Vol. 15 (1962), p. 15.

19. E. Tyan, "Méthodologie et sources du droit en Islam", *Studia Islamica*, Vol. X (1959), p. 97.

20. *Ibid.*

21. *Ibid.*

22. *Ibid.*, p. 98.

23. G.F. Hourani, "Two Theories of Value in Medieval Islam", *Muslim World*, Vol. L (1960), pp. 269-278.

24. Sa'īd Ramaḍān al-Būṭī, *Ḍawābiṭ al-maṣlaḥa fī al-sharī'at al-Islāmiyya*, (Dimashq Umawiya, 1966-67), pp. 12-14.

25 *Ibid.*, pp. 23-60.

26. Ibid., p. 414.

27. M. Kerr, "Rashīd Riḍā and Legal Reform", *Muslim World*, 1960, p. 108.

28. *Islamic Reform*, p. 56.

29. *Ibid.*, p. 60.

30. *Ibid.*, p. 77.

31. *Ibid.*, p. 67.

32. *Ibid.*, p. 73.

33. *Ibid.*, p. 76.

34. *Ibid.*, p. 81.

35. *Ibid.*, *Muslim World*, *op. cit.*, p. 107.

36. R. Paret, *op. cit.*, mentions 1194 as the year of Shāṭibī's (d. 1390) death, which is in fact the year in which Abū'l Qāsim Muḥammad b. Fīra al-Shāṭibī died. See

Brockelmann, *G.A.L.* (Brill, 1943), p. 520, and F. Krenkow, "Shāṭibī", in *E.I.*[1], Vol. IV, p. 337-338. Unfortunately, the same error is repeated in the heavily edited and revised version of Paret's article in the Urdu Encyclopaedia of Islam. *Urdū dā'ira ma'ārif Islāmiyya* (Lahore: Danishgāh Panjāb), Vol. II, (pp. 586-591), p. 589.

37. Kerr, *op. cit.*, p. 194, referring to Riḍā's mention of Shāṭibī rightly quotes his year of death, but in his index on p. 247 identifies him as Abū'l Qāsim b. Firra ash-Shāṭibī.

PART THREE

SHĀṬIBĪ'S PHILOSOPHY OF ISLAMIC LAW

Chapters

AL-MUWĀFAQĀT

To study Shāṭibī's legal philosophy, we have chosen to focus on the concept of *maṣlaḥa*. A proper appreciation of this concept is possible only if it is studied within the structure and formulation that Shāṭibī himself devised. Shāṭibī developed his legal philosophy as his doctrine of *maqāṣid al-sharī‘a* in his four volume work *al-Muwāfaqāt*. Our study is therefore based mainly on *al-Muwāfaqāt*. Before going into a detailed study of the book, this chapter attempts to introduce the book and its appreciation by the scholars of Jurisprudence.

Shāṭibī's *al-Muwāfaqāt* has been so extensively used by modern scholars that one can find a significant amount of its positive contribution towards the making of modernists' conception of Islamic law. In particular, the concept of *maṣlaḥa*, the essential ingredient of modernists' concept of law is frequently drawn from Shāṭibī.[1]

The significance of *al-Muwāfaqāt* in modern legal thinking may be seen in the fact that in Egypt, Muftī Muḥammad ‘Abduh used to advise scholars and his students to study *al-Muwāfaqāt* in order to understand the true philosophy of "Islamic law making".[2] In Pakistan, Abū'l A‘lā Mawdūdī, in his programme to introduce Islamic law in Pakistan, recommends the translation of *al-Muwāfaqāt*, among other books on the philosophy of law, into national languages, "So that our law-experts may acquire a deeper insight into and gain a correct understanding of the spirit of Islamic fiqh".[3]

Since its first publication in 1884 in Tunis, five editions of *al-Muwā-faqāt* have so far appeared[4], all edited and annotated by well-known scholars such as Mūsā Jār Allāh[5], Muḥammad al-Khiḍr Ḥusayn and ʿAbd Allāh Darāz.

Evidence for the merit of Shāṭibī's lengthy work may be drawn not merely from the number of editions it has undergone but, more importantly, from the rank which *al-Muwāfaqāt* soon attained among works on Muslim law. It came to transcend even the limits of the Sunnī schools of law. With few exceptions, modern Muslim authors on legal matters or theories frequently refer to Shāṭibī as an authority. The works of the following eminent authors adequately substantiate this point: Abū Zahra, Maʿrūf Dawālībī, Muḥammad Iqbāl, Muḥammad Khuḍrī, Yūsuf Mūsā, Muṣṭafā Zarqāʾ, Abū Sinna and Abū ʿAbd Allāh ʿUmar.[6]

Furthermore, some modern authors grant to Shāṭibī a rank as high as that of *mujaddid* (religious reformer believed to appear at each turn of a century). Rashīd Riḍā counts him among the *mujaddid*s of the 8th/14th century and regards his contribution as equal to that of Ibn Khaldūn.[7] Fāḍil Ibn ʿĀshūr[8] and ʿAbd al-Mutaʿāl al-Ṣaʿīdī[9] also express the same opinion, but Ṣaʿīdī adds that Shāṭibī ranks alongside Shāfiʿī in significance, because his exposition of the goal and spirit of Islamic law made it possible for Islamic law to escape the impasse into which the strict adherence to the limits defined by Shāfiʿī in *uṣūl al-fiqh* had led.

As we noted in Chapter Two, Shāṭibī has other works besides *al-Muwāfaqāt* to his credit, the more notable among them being *al-Iʿtiṣām*. The latter is however focussed on the question of *bidʿa* or innovation. The exposition of Shāṭibī's legal philosophy in a compact and comprehensive manner is to be found only in *al-Muwāfaqāt*, particularly in its second volume. The present study therefore concentrates on *al-Muwāfaqāt*; other works have been used for elaboration and reinforcement of the exposition of the doctrines of *al-Muwāfaqāt*.

It would have been very useful to place our study *of al-Muwāfaqāt* in the context of other previous studies of the book. Curiously, however, despite the prominence of the book and the wide acknowledgement of Shāṭibī's contribution, no exclusive study is yet known to have been made-either on Shāṭibī or on *al-Muwāfaqāt*.

Two reasons can, perahps, be suggested for the absence of such studies. One, as ʿAbd Allāh Darāz, the commentator on *al-Muwāfaqāt*, remarks is the fact that Shāṭibī's thought is too difficult and too complex to be easily penetrated.[10] Margoliouth also referred to a confusion and subtlety in Shāṭibī's views.[11] This complexity is not due to any abstractness of thought or to any bizarreness in his style or in his choice of words. His style is lucid, and his discussion is systematic and clear. The difficulty in understanding Shāṭibī lies, rather, in the fact that a study of his thought demands not only a sufficient knowledge of the development of *uṣūl al-fiqh* in prior times, but also a fair acquaintance with the development of the doctrines of *fiqh*, theology, philosophy and mysticism. More importantly there is required a knowledge of the political, economic and social developments in Shāṭibī's time as well. Without this background knowledge his views appear to be contradictory, vague or abstract, and hence difficult to follow. The preceding five chapters have tried to cover this ground.

The second reason has to do with a generally skeptical attitude of Islamicists towards studies of Islamic doctrines on the formal level. Gibb, for example, warns against formally studying Muslim theological doctrines arguing that since Islamic theology is always forced into extreme positions, it exhibits a predilection for words and form. Islamic doctrine thus presents an outer formulation rather than an inner function or reality. Hence Islamic doctrines, taken literally, are not of much help in understanding the inner religious attitudes of Muslims.[12]

Such warnings discouraged any study of Islamic doctrines *per se*, including legal theory. In his discussion of Islamic legal theory, S. Hurgronje dismissed a discussion of the question of whether all acts are forbidden by nature and that only those specified by the divine law may be allowed...saying that "these and similar questions may be of importance to the Imām al-Ḥaramayn, but they do not help us to a correct understanding of Islam".[13] Chehata maintains that *uṣūl al-fiqh* was born independently of *fiqh* and developed without influencing the science of law or being influenced by it.[14] Schacht concludes that the theory of *uṣūl al-fiqh* is of little direct importance for the positive doctrines of the schools of law.[15] Why, if a study of *uṣūl al-fiqh* has no relevance to the understanding of *fiqh* and is merely a consideration of words and forms if studied *per se*, should it be studied at all?

The first printing of *al-Muwāfaqāt* in 1884, though diligently edited, did not contain any commentary or analysis of the work. In 1909

the second printing appeared with an introduction in Turkish by Mūsā Jār Allāh. In 1913 some extracts from another of Shāṭibī's work, al-I'tiṣām, appeared in the Cairo journal al-Manār. These extracts stirred the interest of scholars in Shāṭibī.

In 1916, Ignaz Goldziher, in his translation and critical study of Ghazālī's work Faḍā'iḥ al-bāṭiniyya made use of these extracts to compare Shāṭibī with Ghazālī. Although Goldziher's knowledge about Shāṭibī was limited (only the above-mentioned extracts and Turkish introduction were available to him), and although he confused al-I'tiṣām with al-Muwāfaqāt (as he insisted on identifying these extracts as part of al-Muwāfaqāt), yet he is the first scholar who tried to place Shāṭibī's thought into a historical perspective. While comparing similarities in the treatment of the Bāṭinīs by Ghazālī and Shāṭibī, he found them identical. He, therefore, drew a general conclusion that "in many ways Shāṭibī is through and through penetrated with the ideas of Ghazālī".[16]

Rashīd Riḍā, himself a warrior against bid'a, was largely responsible for creating the image of Shāṭibī as a crusader against bid'a. After publishing the above-mentioned extracts from Shāṭibī on bid'a in al-Manār, he edited and published Shāṭibī's al-I'tiṣām in 1913/1914.

This theme was further stressed by Rashīd Riḍā in the biography of Muḥammad 'Abduh which was published in 1931.[17]

Al-I'tiṣām was reviewed by D.S. Margoliouth in The Journal of the Royal Asiatic Society in 1916. In his very brief review Margoliouth described the work as "occupied with juristic subtleties and distinctions which become more and more confused towards the end of the book".[18] Thus implicitly he rejected the work as not worthy of further scholarly attention.

It was about the same time that, on the suggestion of Goldziher, a notice on Shāṭibī was included in Brockelmann's Supplement. This notice was based entirely on the information provided by Goldziher. Some of the factual mistakes by Goldziher were also included without correction.[19]

About the same time, Muḥammad Khuḍrī (d. 1927), a teacher at Gordon Law College in the Sudan at that time, published his Uṣūl al-fiqh, for which, in many ways, he drew heavily upon Shāṭibī's al-Muwāfaqāt. He also disclosed in the preface that it was on the suggestion of Muḥammad

'Abduh that he had turned to Al-Muwāfaqāt for understanding the nature of Islamic legislation (asrār al-tashrī' al-Islāmī).[20]

While Rashīd Riḍā's interpretation of Shāṭibī depended solely upon al-I'tiṣām, that of Khuḍrī was entirely shaped by al-Muwāfaqāt. In the former he appears as a crusader against bid'a, while in the latter as a philosopher-jurist. Khuḍrī argued that Shāṭibī's teachings presented the real spirit of Islamic law which had been forgotten by medieval jurists.

Muḥammad Ḥasan al-Ḥajawī, in his lectures on the history of Islamic Jurisprudence, given in 1918, did not differ greatly from Riḍā and Khuḍrī in presenting Shāṭibī's image as a reformer.[21] But believing in this image he misread Shāṭibī's concept of obedience (ta'abbud). Ḥajawī, in his lectures, maintained that the flexibility of Islamic law was lost in later Islamic history as the jurists extended ta'abbud even to those acts which fell under the category of mu'āmalāt. A certain correspondent, in order to refute Ḥajawī's argument, quoted Shāṭibī on the point that the consideration of ta'abbud is inevitable in mu'āmalāt as well. To reject this argument, Ḥajawī referred to 'Izz al-Dīn 'Abd al-Salām in his support and judged the quotation from Shāṭibī in this light as he said:

> This [statement of 'Izz al-Dīn] is opposite to your quotation from the author of al-Muwāfaqāt where he narrowed [the application of maṣlaḥa] by imposing ta'abbud on all categories of acts. But he (Shāṭibī) did not support his contention with any proof.[22]

We shall deal with this point in detail later in the course of our discussion. It must, however, be pointed out at the moment that such an interpretation of Shāṭibī's view of ta'abbud is quite misleading. Shāṭibī certainly differentiated between two kinds of obligations, those which are absolute and not subject to change, consisting of 'ibādāt, and those which are relative and subject to changes, consisting of 'ādāt which include mu'āmalāt. The former are ta'abbudī and the latter maṣlaḥī. This distinction is maintained on the first level, i.e. that of shāri', though both may become ta'abbudī on the second level, i.e. that of mukallaf.

In 1941 Lopez Ortiz published his invaluable detailed study of certain fatāwā (responsa) given by the Granadian jurists of the fourteenth century.[23] Among these Shāṭibī's fatāwā were also included. This study provides us with the actual historical context against which Shāṭibī's al-Muwāfaqāt can be studied. Although Ortiz's study is not concerned with

the philosophical questions of a legal theory and thus does not include *al-Muwāfaqāt*, yet he confirms that in his *fatāwā*, Shāṭibī relied on the notions of *tashīl* (facilitation) and *istiṣlāḥ*. Shāṭibī defended custom against the rules of *fiqh*. It is also significant to note that Ortiz was impressed by the deep insight that Shāṭibī showed into the economic of the society.

Since Ortiz was concerned with Shāṭibī's *fatāwā* and not with his philosophy of law, one might be misled by his remarks to conclude that Shāṭibī's reference to *tashīl* and *istiṣlāḥ* was a measure of expediency. Such an understanding of Shāṭibī is misleading because the principle of *maṣlaḥa* in Shāṭibī's legal philosophy is a basic concept; not an expedient method of legal reasoning. Lopez Ortiz's remarks may, however, be best understood in reference to Shāṭibī's doctrine of the Ends of the law.

In 1916, in his study on Mālik b. Anas, Abū Zahra observed that on the problem of *'umūm* and *khuṣūṣ* (the general and specific use of words/expressions in general or specific meanings), Shāṭibī forsook the Mālikī stand in favour of that of the Ḥanafīs.[24]

We need not go into the details of Abū Zahra's explanation. It is sufficient to note that Ḥanafīs and Mālikīs disagree on the definition as well as on the legal value of *'āmm* and *khāṣṣ*. According to Abū Zahra, for Ḥanafīs, the *'āmm* is rated as definite or absolute (*qaṭ'ī*); while for Mālikīs it is only probable (*zannī*). Both schools, however, agree that *qaṭ'ī* can be particularized (*takhṣīṣ*) only by another *qaṭ'ī*. Consequently, Ḥanafīs reject particularization of the Qur'ānī commands by those *aḥādīth* which have only probable (*zannī*) authenticity. Mālikīs, on the other hand, accept such particularizations, because, for them it is only the *khāṣṣ* in the Qur'ān, which is *qaṭ'ī*, and which cannot be particularized by a probable *ḥadīth*.

In 1951 'Abd al-Muta'āl al-Ṣa'īdī observed that in matters of dogma, Shāṭibī was rigid like other jurists such as Ibn Taymiyya and Ibn Qayyim. Ṣa'īdī refers to Shāṭibī's view on *ribāṭ* to uphold his point. He states that Shāṭibī declared that to dwell in a *ribāṭ* for the sake of *'ibāda* only, constituted *bid'a*.[25]

Fāḍil Ibn 'Āshūr credited Shāṭibī with providing an escape from the impasse that Islamic jurisprudence faced in the fourteenth century. Furthermore, according to Ibn 'Āshūr, Shāṭibī rejected the differentiation between theoretical and practical religion—a distinction which was maintained by a number of theologians and philosophers.[26] Shāṭibī insisted on the

unity in the essence of religion. That is why he also opposed the practice of classification of *bid'a* into praise-worthy and condemnable.

Ibn 'Āshūr argues that Shāṭibī and Ibn Lubb had fundamental differences on the legally binding nature of certain acts. By binding nature Ibn 'Āshūr means the process of acts being or becoming *'ibādāt* or religious obligations. Ibn 'Āshūr concludes that Shāṭibī's concept of religion was more comprehensive than most other jurists' because he considered the payment of taxes to government to be a religious duty, thus regarding them as *'ibādāt*.

In a study of transactions in the *Sharī'a*, made in 1955, Ṣubḥī Maḥmaṣānī was struck by the modern subjective approach adopted by Shāṭibī in torts.[27] Shāṭibī maintained that if an act which is legal in itself is committed with the sole intent of inflicting injury upon others, it is legally prohibited and must be prevented. Maḥmaṣānī observed that this subjective approach is quite modern as it directs itself to the intent of the person exercising the right. This approach also stands in contrast to the traditional objective approach as formulated in the *Majalla*.

It was, perhaps, this finding that led Maḥmaṣānī to a further study of Shāṭibī. In his lectures in 1962 he was more enthusiastic and admiring of Shāṭibī. Maḥmaṣānī believes that the foundations of the modern renaissance in Islamic legal thought were laid in the fourteenth century by the Muslim jurists who wrote on the methodology and the ends of Islamic law. In these writings they were the precursors of western legal philosophers such as Montesquieu who taught that the evolution of law takes place conditioned by local, temporal and situational changes. Maḥmaṣānī recalls Shihāb al-Dīn al-Qarāfī, 'Izz al-Dīn 'Abd al-Salām, Ibn Qayyim and Shāṭibī as such philosophers of law. Among them, however, he singles out Shāṭibī for the finest exposition of Islamic jurisprudence and philosophy of law.[28]

Since 1960 references to Shāṭibī's *al-Muwāfaqāt* have become so frequent in almost all works on Islamic law that a complete account of them is quite impossible. Further, such an account would not be relevant to our purposes because few of these works aim to study Shāṭibī's philosophy. We will, however, take note of some of the more important recent studies.

In his *Islamic Methodology in History* published in 1965, Fazlur Rahman discusses Shāṭibī's views in detail to a far greater extent than earlier scholars. Rahman, in his *Islam*, considered *al-Muwāfaqāt* as a work on the philosophy of law and jurisprudence.[29] Rahman has observed Shāṭibī's views on the following points: his concept of knowledge, his views about the role of human reason in acquiring knowledge, and his views on *ijtihād* and *taqlīd*. Since these points have been studied mainly in reference to Shāṭibī's epistemology, Rahman finds Shāṭibī little different from other Muslim thinkers in whose arguments Rahman sees a "patent denial of faith in the intellectual and moral powers of man".[30]

Rahman, however, is reluctant to carry the above conclusion to Shāṭibī's legal thinking. He observes that although Shāṭibī "categorically denies that reason has any primary role in law-making or even in the formulation of the moral imperatives, yet he (Shāṭibī) himself has exercised a great deal of rational power in fixing the "goals of sharī'a."[31]

He also finds an implicit confusion in Shāṭibī's statement about *ijtihād* that it "is the necessary duty of a Muslim" along with the stipulation that the *ijtihād* should not contradict the objectives of *Sharī'a*. Rahman finds this stipulation inconsistent because the objectives of the lawgiver cannot be formulated without the operation of *ijtihād*.[32]

The above observations have significant implications for our study. Goldziher's suggestion of Ghazālī's thorough influence on Shāṭibī may mean Shāṭibī's acceptance of Ghazālī's view on *maṣlaḥa*. Ghazālī is known to have rejected *maṣlaḥa mursala*. His influence on Shāṭibī would thus amount to the rejection of the adaptability of Islamic legal theory to social changes. Shāṭibī's opposition of *bid'a* (innovation), as presented by Rashīd Riḍā and others, signifies that he believed in the immutability of Islamic law.

Ḥajawī, Ṣa'īdī and Rahman conclude that Shāṭibī was rigid, conservative and opposed to rational interpretation of legal matters. In other words, they are suggesting that Shāṭibī would oppose the accommodation of Islamic law to social changes.

On the other hand, Khuḍrī, Maḥmaṣānī and Lopes Ortiz have observed that his views in legal matters were flexible and that he preferred the consideration of human need to the hardship incurred in following the legal texts to the very letter.

Ibn 'Āshūr's interpretation of Shāṭibī's concept of *dīn* (religion) and Ḥajawī's conclusion about Shāṭibī's conception of *ta'abbud* (obedience) have very serious implications for Shāṭibī's view of the adaptability of Islamic law. An all-comprehensive concept of religion and an all-inclusive conception of obedience as held by Shāṭibī suggest that he viewed every legal and social change from the angle of "religion" and "obedience" which only imposes limits on adaptability of Islamic legal theory to social changes.

Abū Zahra's comment has obvious methodological implications. It suggests that Qur'ān and Ḥadīth, being *qaṭ'ī* (definitive), cannot be particularized by what is *ẓannī* (probable). In the light of this view, if the concept of *maṣlaḥa* is employed to particularize the Qur'ān and Ḥadīth, it must either be invalid, or the concept of *maṣlaḥa* must be proven to be as definitive as the Qur'ān and Ḥadīth.

If the scholars are disagreed as to the assessment of Shāṭibī's *al-Muwāfaqāt*, their disagreement stems from their differences of understanding and interpretation of Shāṭibī's basic terms such as *bid'a*, *ta'abbud*, *dīn*, etc. As is shown in the following chapters, the above terms are related to Shāṭibī's conception of *maṣlaḥa* which is the basis of his doctrine of *maqāṣid al-sharī'a*, and they cannot be properly understood in isolation from this conception.

It is evident from these discussions that *al-Muwāfaqāt* has been a prominent work on Islamic legal philosphy. No comprehensive study of the work has been done so far. The opinions expressed by scholars about this work and the views discussed therein are only partial studies.

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NOTES

1. Malcolm H. Kerr, *Islamic Reform, The Political and Legal Theories of Muḥammad 'Abduh and Rashīd Riḍā* (California: University of California, 1966), p. 55 ["The element in their jurisprudence which the modernists have particulrly seized upon as the basis for dynamism and humanism is the notion of *maṣlaḥa* (welfare, benefit, utility".]

2. Muḥammad Khuḍrī, *Uṣūl al-Fiqh*, (Cairo: Maṭba' al-Istiqāma, 1938) p.11, relates that when he was appointed to teach Islamic law in Gordon Law College in Sudan, he planned to write a book on *uṣūl*. He discussed with 'Abduh, when the latter was visiting Sudan, who then recommended *al-Muwāfaqāt* to be used as a basis for the studies on the *asrār al-tashrī' al-Islāmī*.

   Also Muḥammad 'Abd Allāh Darāz, in his introduction to *al-Muwāfaqāt*, Vol. I, (Maṭba' Tijāriya, n.d.) relates that "often we listened to the recommendation (*waṣiyya*) of the late (Shaykh 'Abduh) to the students to obtain this book, and I was ever anxious to fulfil his will." (pp. 12-13).

3. Abū'l A'lā Mawdūdī, *Islamic Law and Constitution* (Lahore: Islamic Publications, 1960), p. 113-114.

4. See above p. 111.

5. Mūsā Jār Allāh's (d. 1942) edition, in spite of patient search, is not available to the writer of this dissertation.

6. Abū Zahra, *Mālik* (Cairo: Maṭba' Aḥmad 'Alī, First edition published in 1946); Dawālibī, *al-Madkhal ilā 'ilm uṣūl al-fiqh* (Beyrouth: Dār al-'ilmī l'il mala'īn 1965), especially pp. 433-41.

   Iqbal, *Reconstruction of Religious Thought in Islam* (Lahore: Ashraf, 1965), pp. 169, 174.

   Yūsuf Mūsā, *al-Madkhal li dirāsāt fiqh al-Islāmī* (Cairo: 1961), pp. 196-202. Muṣṭafā Zaqrā, *al-Madkhal l'il-fiqh al-Islāmī*, Vol. 1 (Dimashq: Matba' Jāmi'a Dimashq 1961), pp. 62ff., particularly p. 68, n. 1.

   Abū Sinna and others, *Madkhal al-fiqh al-Islāmī* (Cairo: Jāmi'a Azhar, 1965), pp. 97-100, 119-131 and 163-165.

   'Abd Allah 'Umar, *Sullam al-wuṣūl li 'ilm al-uṣūl* (Cairo: Dār al-Ma'ārif, 1956), pp. 73-76, 233-239.

7. Riḍā, *Ta'rīkh al-ustādh al-Imām al-Shaykh Muḥammad 'Abduh*, Vol. I, (Cairo: Dār al-Manār, 1350/1931), p. *jīm* and his introduction to *al-I'tiṣām*, (Cairo: Tijāriya, *circ*. 1332/1913) p. *jīm*.

8. Fāḍil ibn 'Āshūr, *A'lām al-fikr al-Islāmī fī tārīkh al-Maghrib al-'Arabī* (Tunis: Maktabat al-Najāḥ, n.d.), pp. 71-72.

9. 'Abd al-Muta'āl al-ṣa'īdī, *al-Mujaddidūn fī'l Islām*,, (Cario: Maktabat al-Adab, n.d.), pp. 294-296, 309.

10. 'Abd Allāh Darāz, *op. cit.*, p. 11-12.

11. D.S. Margoliouth, "Recent Arabic Literature", in *Journal of Royal Asiatic Society* (London: 1916), pp. 397-98.

12. H.A.R. Gibb, *Studies on the Civilization of Islam* (Boston: Beacon, 1968), pp. 205-206.

13. Hurgronje, *Selected Works of C. Snouck Hurgronje*, (Ed.) G.H. Bousquet and J. Schacht, (Leiden: Brill, 1957), p. 287.

14. Chafique Chehata, "Logique Juridique et droit musulman" *Studia Islamica*, Vol. XXIII (1965), p. 16.

15. J. Schacht, "Fikh" in El², Vol. II, p. 890.

16. Ignaz Goldziher, *Streitschrift des Gazalī gegen die Baṭinijja-Sekte* (Leiden: 1916), pp. 32-34.

17. See above note 7.

18. See reference above in note 11.

19. Goldziher op. cit. p. 33. He says, "Meine Kenntnis von den Beziehungen dieses Sāṭibī auf das Mustazhirī grunden sich auf Auszüge, die aus dem Kapitel (الاعتصام) der *Muwāfakāt* in der arabischen Zeitschrift *al-Manār* unlängst".

   Goldziher wrote thusly despite the fact that the title of the book in this issue was, specifically mentioned as "*Kitāb al-I'tiṣām*" cf. *Al-Manār*, Vol. XVII(1913-14) pp. 54-63, 273-293.

   Elsewhere as well, on the basis of this conclusion, Goldziher commenting on 'A Ālī al-Qārī's mention of a book on "al-Ḥawādith al-Bida' " by Shāṭibī, again suggested, "Es ist jedoch möglich, dass damit ein Kapitel der *Muwāfakat* gemeint sei." (op. cit., n 1).

   This confusion was further carried on by Brockelmann, *Geschichte der Arabischen Litteratur, S II*, p. 375, where he, probably basing his information on Goldziher's remarks, wrongly describes these excerpts in *Al-Manār* as "Auszüge" of *al- Muwāfaqāt*.

20. See above note 2. Khuḍrī's *Uṣūl*... is available to us in its third edition, 1938 and second edition, 1933. The date of the first edition could not be known.

21. Muḥammad b. Ḥasan al-Ḥajawī, *al-Fikr al-sāmī fī tārīkh al-fiqh al-Islāmī* (Rabāṭ, 1345 A.H.), Vol. IV, p. 82.

22. *Ibid.*, p. 17.

23. Lopez-Ortiz, J. "Fatwas granadinas de los siglos XIV y XV", *Al-Andalus*, Vol. VI (1941), pp. 73-127.

24. Abū Zahra, *op. cit.*, p. 267.

25. Ṣa'idī, *op. cit.*, p. 311. Ṣa'idī's views on Shāṭibī's rigidity are mostly unfounded. For instance his claim that Shāṭibī believed in only one saved sect, *Salaf Ahl al-Sunna*,

and none else, is just opposite to what Shāṭibī maintained. cf. *Al-I'tiṣām*, Vol. II, pp. 217ff.

26. Ibn 'Āshūr, *op. cit.*, pp. 73-74.

27. Ṣubḥī Maḥmaṣānī, "Transactions in the Sharī'a", in *Law and the Middle East*, Vol. I, ed. M. Khadduri and H.J. Liebesny, (Washington, 1955), p. 187.

28. Ṣubḥī Maḥmaṣānī, *Muqaddima fī iḥyā' 'ulūm al-shar'iyya* (Bayrūt: Dār al-'ilm li'l mala'īn, 1962), pp. 22, 63, 65-67.

29. Rahman, *Islam* (London: Weidenfeld, 1966), p. 108.

30. Rahman, *Islamic Methodology in History*, (Karachi: Central Institute of Islamic Research, 1965), p. 154.

31. *Ibid.*, pp. 133-4.

32. Ibid., p. 160.

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CHAPTER SEVEN

NATURE OF ISLAMIC LAW

Shāṭibī has defined most of the essential terms which he uses, but a definition of *sharī'a* does not seem to be attempted. An understanding of a term can, however, be obtained from other words used as its opposites or used in connection with it.[1] Accordingly, we find that Shāṭibī's concept of *sharī'a* is associated essentially with the notion of "revelation".

On the epistemological level the terms *'aql* (human reason) and *hawā* (desire)[2] are used as terms opposed to *sharī'a*. Ontologically *sharī'a* is contrasted with *kawn* (being).[3] This semantic opposition has significant implications for the concept of *sharī'a*. Firstly, it indicates that law is not arbitrary and merely based on personal likings. Secondly, the values on which *sharī'a* is based are not determined by human reason. Thirdly, it implies that being opposed to *kawn* which is changing, *sharī'a* is universal and absolute. Shāṭibī distinguishes between *kawn* and *sharī'a* also as two different aspects of Divine Will. *Kawn* is the expression of the creative aspect of Divine Will, and *sharī'a* is the expression of the legislative aspect. This distinction implies that in the first aspect there is a necessary connection between will and the occurrence of an event. This connection is not implied, however, in the Legislative Will.

The term *sharī'a* is also used as synonymous with *waḥy* (revelation)[4]. Since *waḥy* is a process and *sharī'a* is not, the synonymous use of the two makes sense only if we understand *sharī'a* as the substance and *waḥy* as a process of conveying it. As for Shāṭibī's explanation of the term through

synonyms or substitutes for it, the Qur'ān is equated with the *sharī'a*.[5] The application of the term is also extended to *ḥadīth* of the Prophet, the *sunna* of the Prophet and that of his companions;[6] but whereas the rulings in the Qur'ān are certain (*qaṭ'ī*), in general and in detail, the *sunna* is certain only in general and is but probable (*ẓannī*) in detail.[7] The absolute and original *shāri'* is Allāh only. The Prophet, *muftī*s and *mujtahid*s are also considered to be *shāri'* by Shāṭibī, but they function on God's behalf,[8] and not in their own right.

The characteristics of *sharī'a* that Shāṭibī has enumerated are the following: blessed (*mubāraka*)[9], Arabic[10], general (*'ummiyya*)[11], universal (*'āmma; kulliya*)[12], liberal (*samḥa*)[13], convenient (*sahla*)[14], protected (*ma'ṣūma*)[15]. Shāṭibī's views on these characteristics will be discussed in the following chapters.

The other terms that are associated with the term "Islamic law" are *fiqh* and *uṣūl al-fiqh*. The term *fiqh* is used by Shāṭibī more in its literal and essential meanings than in the technical sense. The phrase *fiqh al-sharī'a*[16] as used by Shāṭibī may mean "understanding of the *sharī'a*", "investigation of the *sharī'a*" or "establishing the meaning of *sharī'a*".

Shāṭibī, however, uses the term "*uṣūl al-fiqh*" more often and in a certain technical sense. In *al-I'tiṣām*, he defines it as follows:

"*Uṣūl al-fiqh* means [to infer, by method of] induction, universal [principles] from the evidences [of *sharī'a*] until the *mujtahid* finds them conspicuous (*nuṣb 'ayn*), and the searcher finds them easy to apply".[17]

The equations he uses to explain the term show that his concept of *uṣūl al-fiqh* is very closely connected with that of *sharī'a*. He argues that *uṣūl al-fiqh* have the same relationship to *sharī'a* that the *uṣūl al-dīn* (the principles of religion; *kalām*) have with *dīn*.[18] He explains that to Qāḍī Ibn al-Ṭayyib *uṣūl al-fiqh* meant the principles of the science of *sharī'a* (in the epistemological sense), whereas to Imām al-Juwaynī they were the proofs (*adilla*) of *sharī'a*.[19] Shāṭibī did not consider them either as proofs or directives for *sharī'a*, but as the principles derived inductively from the underlying universal laws in *sharī'a*.[20]

An analysis of Shāṭibī's views of the origins of *sharī'a* reflects his concept of *sharī'a* closely associated with "revelation". According to

Shāṭibī, *sharī'a* is the light of knowledge. In their pre-*sharī'a* state, mankind sought their ends at random. Because of its inclination to passions and desires (*hawā*), the human reason was unable to discover the *maṣāliḥ* (good) of all mankind. Its efforts led only to confusion. It drew conclusions with defective analogies; it sought health from a sick body. Mankind was walking in reverse yet it believed that it was on the right path. This state of self-assurance led to sheer determinism (*ijbār*) in the very concepts of freedom, power, and choice (*aqdār*). Necessitarianist values (*ḥukm al-iḍṭirār*) were attached to acquired acts (*al-af'āl al-muktasaba*). Men were in this plight, when God showed His Grace and sent prophets to every people with *sharā'i'* (pl. of *sharī'a*). The prophets explained to the peoples in their own languages what was the true right path.[21]

This account of the origin of *sharī'a* is difficult to be interpreted in terms of time because Shāṭibī on other occasions argues that there never was a time without *sharī'a*. This account then can be understood either in a an allegorical sense or in the sense that Shāṭibī was referring to what he calls the *fatra*, the period of interval in between periods of revelations of *sharā'i'*.

The last in these series of revelations was sent to Muḥammad b. 'Abdullāh. God revealed to him His Book, the Qur'ān. This book established the criterion of distinguishing certitude from doubt.[22]

The Qur'ān is the totality (*kulliya*) of *sharī'a*, the fountain-head of wisdom. It is the source of *sharī'a*.[23] The Qur'ān was revealed first in Mecca and was continued in Medina. The universal principles were revealed in Mecca; they included among other things belief in God, the Prophet and the Hereafter. These were followed by general rules such as those about prayer, alms, etc. Along with this were revealed general ethical rules about justice, virtue, patience, etc. These rules generally concerned religion and social practices in the pre-Islamic period. Very few specific rulings were revealed in Mecca. When the Prophet came to Medina the territory of Islam had expanded. From then on, the general principles revealed in Mecca were complemented with additional particular rulings pertaining to contracts, prohibition of intoxicants, prescription of penal punishments, etc.[24]

The need for detailed rules might have been felt because of various reasons. Often there arose disputes among the people which required

detailed judgments. There were controversies also because many people had accepted Islam while retaining their pre-Islamic mental attitudes and social habits. God revealed to them all that they needed,[25] sometimes in the Qur'ān and sometimes by the *Sunna*. Thus the whole of *sharī'a* came to be completed in Medina, and God declared, "Today I completed your religion... "

The *fuqahā'* persued the task of applying these rules and prescriptions in further details. They searched the basis of these rules in order to apply them to particular cases. This process was the method of *ijtihād* (legal reasoning).[26]

The above account indicates that *sharī'a* insofar as it is a revelation of laws by God, was completed in the days of the Prophet. As to the question of change in the days of the Prophet, Shāṭibī maintains that the fundamental principles revealed in Mecca were permanent; they were never changed or repealed, because they were the necessary and essential matters. Abrogation (*naskh*) occurred only in particular details, not in universals.[27]

In other words, the finality and immutability of Islamic law in the days of the Prophet meant the non-changeability of fundamentals of the *sharī'a* only. Legal change is, however, possible in individual cases. The question then is to ask which legal institution does Shāṭibī regard as responsible for the function of legal change?

As mentioned elsewhere, two legal institutions are involved in this matter, *futyā* and *qaḍā*. Shāṭibī considers *qaḍā* and *futyā* both as *wilāyāt* (administrative offices).[28] Like the establishing of a government, they are also *kifā'iyya* (societal obligations)[29] In Shāṭibī's sturcture of *maqāṣid*, *kifā'iyya* in contradistinction to *'ayniyya* which are specifically individual obligations of each person, are an obligation for the society as a whole, somehow to be fulfilled though each individual may not be involved. *Kifā'iyya*, however, are still essential and necessary as they are among the *maqāṣid* of *sharī'a*. They are indeed complementary to *'ayniyya* because they make the fulfilment of the latter possible. The *kifā'iyya* aim at achieving the common good (*al-maṣāliḥ al-'āmma*) for all the people, because one individual by himself cannot take care of his interests or his family. How can he attend to the good of the whole society? One necessarily needs co-operation with others. Consequently one works for his own benefit but

also toward the interests of others; thus is the benefit of all achieved by all. Such is the manner in which general (public) institutions such as *khilāfa*, *wizāra*, *niqāba*, *qaḍā* and *futyā* came into being. They were recognized by *sharī'a* in the public interests because were they to be abandoned, the social order would be destroyed.[30]

This clarification was necessary to show that *futyā* and *qaḍā* being societal obligations are necessarily linked with society and hence with social change. Their being classified among the *kifā'iyya* also implies that the *muftī* and the *qāḍī* both perform their functions on behalf of the whole society. Consequently the interests of the society as a whole are required to be considered.

Shāṭibī does not spell out the distinction between the functions of *qāḍī* and *muftī*, but from his discussion of *fatwā* and *iqtidā'*, which follows, it can be assumed that, properly speaking, the institution of *futyā* was regarded by Shāṭibī as responsible for the interpretation of law and the adoption of legal changes.

Shāṭibī believed the *muftī* to be the deputy and successor to the Prophet. A *muftī* relays the commands from God, interprets *sharī'a* for the people and executes them. More important, Shāṭibī regards the *muftī* to be a lawgiver in a certain sense. He explains this opinion in the following manner.

A *muftī*'s knowledge of *sharī'a* is gained either through transmission of tradition or through deduction. In the former case he functions as a *muballigh* (communicator), in the latter he is a law maker (*inshā' al-aḥkām*) which is the function of a *shāri'*. This function qualifies the *muftī* as a true successor (*khalīfa*) to the Prophet.[31]

In regard to the question of authority (*iqtidā'*),[32] Shāṭibī divides the wielders of authority into three categories. First are those in whose actions freedom from error (*'iṣma*) can be demonstrated. In this category are included the Prophet, and the consensus of those people of whom it is customarily believed either that they cannot unanimously agree on error, or that such a consensus is sanctioned by *sharī'a*.

Second are those who by certain specific acts claim the obedience of others. This category includes *ḥukkām* (rulers, officers) who pronounce this claim in the form of commands and prohibitions or by signature. The

third category of authority is the one in which none of the above features exists. The first category is admitted in law without any doubt. The other two, however, need further consideration. The reason is that the objectives of authority in the case of these two types cannot be unanimously determined. Thus Shāṭibī does not admit their authority to command obedience in law.[33] He, nevertheless, accepts the authority of a judge (ḥākim) in the application and execution of law.[34]

Shāṭibī's concept of authority seems to be based on two notions: 'iṣma and qaṭ'iyya. Though 'iṣma implies freedom from error, yet it cannot be understood in the sense of infallibility in Shāṭibī's terminology. To him 'iṣma is equivalent to ḥifẓ (safety, protection, assurance) from change or transformation; but not in a static sense. He explains that the 'iṣma of the Qur'ān has been attained through its wider study, preservation and the development of sciences relating to the Qur'ān. The 'iṣma of the sharī'a in the hands of the generation succeeding Muḥammad came to be as they inferred the rules of sharī'a by seeking its objective from the Qur'ān and Sunna, sometimes literally, sometimes from its implications and sometimes by deducing the 'cause' ('illa) of the command. They applied these rules to cases that were unprecedented. In this way they made matters convenient for their successors. "This is the exact meaning of ḥifẓ…"[35]

Another serious problem in connection with the concept of sharī'a was the wide differences of opinion among the jurists. Since sharī'a found expression in the post-Qur'ānic period mostly through jurists' interpretations, the agreement or disagreement of jurists on a certain point acquired fundamental importance. Their consensus constituted ijmā', a source of law next only to the Qur'ān and Sunna. Their disagreement too could not be underrated. As we have discussed earlier in detail the jurists dominated political as well as social life in Spain. It was thus natural that their opinions even where they disagreed must be honoured faithfully. This gave rise to a paradoxical problem of murā'āt al-khilāf. Since this problem was very consequential for the doctrine of the unity of sharī'a Shāṭibī subjected it to a detailed analysis. What follows is a brief summary of its analysis.

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AL-KHILĀF: DIVERSITY

It has been stated earlier that the aspect of disagreement in Mālikī fiqh was the problem that struck Shāṭibī's mind early in his career and which continued to perplex him even in later times. He wrote to many scholars and disputed with them on the many facets of this matter.

Because of various historical reasons which do not concern us here, Mālikī fiqh abounded with disagreement on a number of cases. This was a very perplexing phenomenon for a tradition which upheld the consensus of scholars and the unity of the practice. Consequently scholars were occupied in a perennial discussion on this issue.

Very broadly speaking, in the course of time, during the development of the Mālikī tradition in Spain, four positions were taken on this issue. First, some scholars, foremost among them Ibn 'Abd al-Barr (d. 463/1079), denied the existence of "disagreement" in Mālikī fiqh. This position was taken generally by some other ancient scholars also.[36] It was essentially this position that Shāṭibī came to adopt after lengthy discussion.

Second position in this respect was taken under the influence of the taṣawwuf. Since ṣūfī-oriented jurists feared that an indulgence in cases where disagreement in opinion existed might lead someone astray in seeking for lenient opinions, they regarded it as an obligation to avoid the cases of disagreement. They considered these lenient opinions as instances of rukhṣa (concession) in contrast to 'azīma (regular) cases which were the only path to be followed by a resolute person.[37]

Shāṭibī traced this trend to the teachings of Qushayrī on the basis of which in a later period upholders of the position had adopted the following formulation: "al-wara' bi'l khurūj 'an al-khilāf" (piety consists in avoiding (the cases of) disagreement).

Under the impact of taṣawwuf, this position had been accepted by a number of fuqahā' as well. Shāṭibī did not question the attitude of ṣūfīs towards rukhṣa as an attitude appropriate to the khawāṣṣ (special, elite) and arbāb al-aḥwāl (the people of mystical states), but he did oppose this

trend insofar as it meant the imposition of an impossible obligation for common people. He took this stand because the ṣūfī-oriented jurists had gone as far as to consider *wara'* as obligatory for every one.[38]

Shāṭibī wrote to scholars in Spain and North Africa. Among the *fatwā*s in answer to his query, Ibn 'Arafa's *fatwā* is available to us as preserved by Wansharīsī.[39]

In his question, Shāṭibī states that scholars such as Ghazālī, Ibn Rushd and Qarāfī maintained that piety consisted in avoiding "disagreement". The basis of their argument was that the cases disagreed upon, in the details (*furū'*) of *shar'* were like *mutashābihāt* (equivocal statements) which the sayings of the Prophet urged to avoid. Shāṭibī, as we shall see a little further below, found it logically impossible to maintain such a position,

Ibn 'Arafa's answer can be summarized as follows. He explained that the cases of disagreement were very few and that to avoid them was not only possible but obligatory. The reason was that these cases, being equivocal, had equally forceful arguments in favour and against the issue; such a situation would then be conducive only to an arbitrary decision. Ibn 'Arafa insisted that to opt for the less convenient was the result of the fear of severe punishments from Allāh. This fear was the reason why Ibn Ḥazm condemned those who sought for convenience in the *sharī'a*. Ibn 'Abd al-Salam also condemned the trend to choose the more convenient of any two *fatāwā*.[40]

The third position regarding differences of opinion was that held by scholars who considered the existence of "disagreement" as proof of permissibility. Shāṭibī distinguished "disagreement" from *murā'āt al-khilāf*[41] which is discussed below. He stated this position in the following words:

> Often a *fatwā* on a certain disputed matter recommended abstention (from the matter in question). It was said, "Why do you recommend abstention whereas the problem is disagreed upon?" Thus the disagreement became the proof of permissibility simply because it was disagreed upon; neither was there any evidence in favour of the soundness of the argument for its possibility, nor was it on the basis of some authority more worthy to be followed than the one which demanded abstention.[42]

MURĀ'ĀT AL-KHILĀF

The fourth position was that of *murā'āt al-khilāf*. This principle not only admitted the existence of conflicting opinions of jurists but also stressed the need to give it full consideration, so as to regard all the conflicting opinions as valid. This principle in some cases led to free permissibility, in some to a hardship and in some to mere impossbility. Although it was a commonly accepted position, Shāṭibī differed and disputed it with a number of scholars. Among them the names of Ibn Qabbāb, Fishtālī, Ibn 'Arafa and Sharīf Tilimsānī are known to us.[43] To help appreciation of the problem, it is advisable to summarize this discussion.

The main points of the question that Shāṭibī posed to the scholars are the following:

In Granada there arose a problem in which different opinions were attributed to Mālik. According to the *uṣūl al-fiqh*, rules relating opinions contradicting one another, as explained below, demanded that every one of these different opinions had to be rejected. It was further realized that such disagreement existed in the major part of the Mālikī tradition. If the rules of contradiction were applied, most of the Mālikī tradition would have to be rejected. As a measure of necessity (*ḍarūra*), Mālikī *fuqahā'* adopted the principle of *murā'āt al-khilāf*, but the application of this principle posed a number of problems.[44]

Shāṭibī illustrated the use of this principle by citing a number of cases. If in a particular case of marriage scholars disagreed on the validity of that marriage, it was to be considered void. Yet in reference to its effects an allowance was to be made for the opinion that favoured its validity. Hence matters such as inheritance...etc., were to be applied as if the marriage were valid. The problems that this position raised for Shāṭibī were the following:

(i) It disregarded the established principle of *uṣūl al-fiqh*, that the consideration of time could declare one of those opinions as 'later' and hence more reliable.

Another principle relevant to cases of contradictory opinions was also discarded. It stated that if two contradictory opinions were attributed to a *mujtahid* both of them should be suspended until one of the two could be established with certainty.

(ii) The Mālikī scholars were not consistent in applying this "allow-ance" (*murā'āt al-khilāf*). In some cases they denied the "allowance", while in other cases they insisted on it. This inconsistency made the soundness of this principle doubtful. On the other hand, it rendered its application arbitrary.

(iii) Thirdly, assuming the soundness of this principle, its basis in the *sharī'a* as a principle of *fiqh* is not known. Apparently this problem refers to the evidence (*dalīl*). The difference between two statements (*qawl*) must inevitably be so because they are based on two different evidences which are contradictory to each other in the sense that the opposite of one is the require-ment of the other.[45]

Thus *murā'āt al-khilāf* would mean granting each one of such statements what is required by the other, entirely or partially.

Sharīf Tilimsānī answered the question[46] by refuting Shāṭibī's argu-ment that among two statements of an *imām* or a *mujtahid*, the later in time eliminates the earlier. Tilimsānī questioned the consideration of the time factor in such cases. His argument was that this consideration implied the principle of abrogation (*naskh*) which is applicable only to statements originating from the lawgiver (*shāri'*). He distinguished among the three: *shāri'*, *al-mujtahid al-muṭlaq* and *mujtahid fi'l-madhhab*. Since it was the *shāri'* alone who could institute laws and who could withdraw them, it was, therefore, in his statements alone, that in case of contradiction the later would abrogate the earlier. The *mujtahid*, whether "*muṭlaq*" or "*fi'l-madhhab*," did not make laws but rather sought and decided in favour of one of the evidences. *Al-mujtahid al-muṭlaq* sought evidence in the commands of the *sharī'a*; the *mujtahid fi'l-madhhab* sought evidence in the statements of *al-mujtahid al-muṭlaq* whom he considered the *imām* for his *madhhab*. The differences of opinion in the case of *mujtahids* was, therefore, based on the difference in choice of evidence. The evidences, which were derived from the *sharī'a*, in the instance of each of the opinions could not be invalid. Hence the question of later and earlier, with the effect of one eliminating the other, could not arise in the case of *mujtahid*.

Although Tilimsānī did not spell out his view yet it can be concluded from his answer that he did not oppose the principle of *murā'āt al-khilāf*. If one follows his argument more closely, one may see that he regarded this

principle as necessary. Since all the different opinions of *mujtahid*s are supposed to be based on certain evidences from the *shāri'*, by neglecting any of them one would be committing the wrong of rejecting *shar'ī* evi-dence.

Tilimsānī's elaboration, however, did not answer Shāṭibī's question. It admitted that the basis of difference lay in the choice of legal evidence, but it did not explain how one could claim the existence of two or more contradictory pieces of evidence in the *sharī'a* bearing on the same case.

Ibn 'Arafa's answer[47] was longer than others. His answer consisted partly of the arguments already seen in Tilimsānī's reply and partly of whittling down Shāṭibī's arguments to contradictions.

He explained the principle of *murā'āt al-khilāf* from a different pers-pective. He defined *murā'āt* as abiding by the implications of *sharī'a* evidence in a given case (*madlūl*) in such a way as also to abide by the im-plications of other evidence in another case. In other words, as a matter of fact, the principle of *murā'āt* implied abiding by the implications of both evidences in those aspects in which a *mujtahid* prefers one piece of evidence to another. In this way, he was neglecting neither of them but was rather abiding by the both at the same time.

Abū 'Abd Allāh al-Fishtālī adopted Ibn 'Abd al-Salām's view in his answer. In reference to an action which is considered wrong by one *mujtahid* and is regarded as sound by the opponent, Fishtālī distinguished between two situations; one before the occurrence of the action and the other after its occurrence. According to him, the prohibition was absolute in the former situation, but once the action had taken place, an allowance may be given to the opposite opinion for the sake of public conveni-ence.[48]

Ibn al-Qabbāb's answer was very succinct and brief. He regarded *murā'āt al-khilāf* as one of the best principles of Mālikī *fiqh*. He defined it as granting to each one of the two pieces of evidence its value (*ḥukm*). He, however, distinguished between two situations; one was a case of disagreement where it was inevitable to prefer one opinion over the other. Of this type are the cases of *ta'āruḍ* (conflict) and *tarjīḥ* (preponderance). Second was the situation where both evidences led to the same conclusion or in some sense complemented each other. Such an instance was a case of *murā'āt al-khilāf*.[49]

UNITY OF SHARĪ'A

Shāṭibī was not satisfied with these answers. They were either irrelevant or they tried to explain away the evident meaning. The only point of agreement for Shāṭibī came from Ibn al-Qabbāb who agreed with him that the problem was really very abstruse.[50]

Shāṭibī believed that there was no place for "disagreement" in sharī'a such as that which constituted the basis of murā'āt al-khilāf. Hence the principle of murā'āt was a false problem. The main conclusion that Shāṭibī reached was the unity of the origins of sharī'a. He maintained that, "all rules of sharī'a originate from one root, even though there may be a diversity of rules."[51]

The basis of this conclusion were the following five points:[52]

(i) A large number of Qur'ānic verses stress the original unity of sharī'a and, further, they condemn "disagreement".

(ii) If disagreement were permissible, there would be no place for the question of abrogation. The need for the discussion of abrogation means only that two statements are so contradictory to one another that one has to be replaced by the other.

(iii) If the existence of disagreement were permitted, it would imply the imposition of an impossible obligation. In other words, to command someone to obey two contradictory commands at the same time is to put him under an impossible obligation.

(iv) The legal theorists (uṣūliyyīn) recommend a decision in favour of rejection of one of the contradictory evidences over the other. This fact implies the non-permissibility of "disagreement".

(v) It would be absurd to maintain that both of the contradictory commands are simultaneously intended by the lawgiver because one would negate the other.

Apart from the linguistic, geographical and historical causes of "disagreement", it was claimed that there were certain factors in sharī'a itself that seemed to favour disagreement. Among these three factors are worth noting.[53]

First, the existence of mutashābihāt (equivocations) in the Qur'ān. These equivocations make allowance for the disagreement of opinions, expressed either in interpretation or in suspension of the judgment. Further, it cannot be denied that the mutashābihāt were intended to be equivocal by the Lawgiver. Shāṭibī discussed the problem of mutashābihāt in detail in al-Muwāfaqāt. He maintained that there was no tashābuh in the fundamentals of sharī'a.[54]

Shāṭibī also disputed the assertion that tashābuh was the intention of the Lawgiver. Dealing with the matter in detail, he distinguished between two intentions (irādāt) of the Lawgiver. One was al-khalqiyya al-qadriyya (creational predestined intention) in which human will had no place.[55] The second was al-'amriyya al-tashrī'iyya (imperative legal intention) in which Divine Will did not impose itself on human will. Shāṭibī argued that mutashābihāt belong to the second category of Divine intention. There, disagreement is not intended by the Lawgiver, because the Qur'ān states that only one of the interpretations is correct. If disagreement were allowed, then every interpretation would have to be regarded as correct.

Second, an analogy is drawn from the shar'ī permission for the exercise of ijtihād (legal reasoning) which, it is maintained, would naturally lead to disagreement. Shāṭibī refuted this argument by referring it back to the problem of tashābuh. He maintained that not every conclusion reached by a mujtahid was correct. Its correctness or error depended on its correspondence with the intention of the Lawgiver which does not favour disagreement.[56]

Third, khilāf was made analogous to the existence of the principle of rukhṣa in sharī'a. This principle, which means to opt for a concession from regular rules in special cases, allows for the existence of disagreement.

Shāṭibī refuted this argument by stressing that rukhṣa does not mean to opt for one of the two equally applicable rules in a case. If it were arbitrary, it would not be allowed in sharī'a. The principle of rukhṣa is applicable only in those cases where it becomes hard or impossible to

abide by the regular rules.   Thus, in fact, *rukhṣa* has to do with two different rules in two different cases, not two different rules in a single case, which is the meaning of disagreement.[57]

To conclude Shāṭibī's arguments, it may be said that he understood *khilāf* (disagreement) essentially as *ta'āruḍ al-'adilla* (contradiction of evidences) while for others it meant essentially *tasāwī al-'adilla* (equal validity of evidences).   Hence, for Shāṭibī *khilāf* involved the problem of *tarjīḥ al-'adilla* (preponderance) while for others it involved only the problem of *jam'* (combining) or *murā'āt* (making allowance).

Shāṭibī's methodological objection concerned the distinction made by Mālikī scholars between *muttafaq 'alayh* (agreed upon) and *mukhtalaf fīh* (disagreed upon).   They stressed that in case of the former, consideration could be given only to that evidence on which it was decided to be "agreed".   In case of *mukhtalaf fīh,* however, the evidence on which the opposing decision was based must also be considered.   Shāṭibī viewed the above standpoint as inconsistent.   If it were *shar'ī* evidence which provided the basis of a decision, then why was it to be disregarded if it opposed a *muttafaq 'alayh?*   Why should a decision be considered as *mukhtalaf fīh* when it was based on a *shar'ī* evidence?

To agree with the upholders of *khilāf* would mean, for Shāṭibī, to believe in the existence of contradictions or diversity in the principles of *sharī'a.*   This belief negates the unity of the origins of *sharī'a.*

It was, however, difficult to explain this unity in the presence of an obvious diversity of evidences in the *sharī'a.*   Shāṭibī, in his investigation of this problem, came to conclude that the unity of *sharī'a* could be explained by the unity of the two intentions of the Lawgiver.   The result of these investigations was his doctrine of the *maqāṣid al-sharī'a* (the objectives of *sharī'a).*   This doctrine constitutes the basis of Shāṭibī's legal thought. An elaboration of this doctrine and its theoretical and methodological implications are discussed in the following chapters.

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CONCLUSION

In the preceding discussion of Shāṭibī's views on the nature of Islamic law we have seen that he does not regard law making essentially an intellectual exercise.   Law is not known through intellect.

For Shāṭibī the source of the knowledge of law is "revelation". The revelation makes the intention and will of Allāh known to man. Shāṭibī has, here, developed the doctrine of the two aspects of Divine Will which was advanced by Ibn Taymiyya as well.   Allāh has expressed or revealed His intention in two manners or at two levels.   One is the revelation of laws through Prophets; this is the expression of His religious/moral/legal intention or will.   The other is the revelation of laws by instituting them in nature.   This is known through physical laws, social habits and human natural instincts and capacities.

Shāṭibī has further elaborated that sometimes human intellect is believed to be the source of the knowledge of laws other than those revealed through the Prophets.   It is not true.   Essentially the source of all such knowledge is revelation.   Consequently it becomes imperative that laws known through other than revealed sources must not be considered as opposed to the revealed laws.   In fact the unity of the Will of Allāh as Creator and Legislator demands that the two should never contradict each other.

Shāṭibī extends his argument along these lines further in his analysis of the definitions of *maṣlaḥa* (ch. IX) and *taklīf* (ch. XI) There it is argued that since the realm of *kawn* is observable and measurable, *sharī'a,* has taken care that its laws conform to the laws of *kawn,* so that they become conveniently knowable to man.

Shāṭibī, in his analysis of *taklīf,* has made it clear that in order to be abided by a legal injunction must be physically possible.   In other words a rule of *sharī'a* must essentially conform to the laws of human physical nature.

In his analysis of the *shar'ī* definition of *maṣlaḥa,* Shāṭibī observes that *sharī'a* has regularised as legal good what is considered to be good in social experience.   Further, when in social experience a certain 'legal good'

begins to harm the fabric of human society or even an individual, it loses its quality of being legally good.

It is in this perspective that Shāṭibī views *sharī'a* as essentially associated with 'revelation' and still is able to argue in favour of the continuity and need of *ijtihād* as we shall see in the following chapters.

NOTES

1. For the validity of this method, we refer to the following work which has used this method in a highly successful manner: T. Izutsu, *God and Man in the Koran* (Tokyo, 1964).

2. *Al-Muwāfaqāt*, comm. 'Abd Allāh Darāz (Cairo, n.d.), Vol. II, 169. Shāṭibī, there, argues that the Qur'ān uses *waḥy* (revelation), which is opposite to *hawā*. *Ibid.*, Vol. I, 35, he contrasts the terms *'aqliyya* and *shar'iyya*.

3. *Ibid.*, Vol. III, 121.

4. See above n.2.

5. *Ibid.*, Vol. III, 369.

6. *Ibid.*, Vol. I, 46-47. To illustrate what is *sharī'a* on a certain point, Shāṭibī quotes from the Qur'ān, *ḥadīth* and sayings of the Companions. This pattern is frequently repeated throughout the book. On p. 56, for instance, he says, "And this is how the *sharī'a* explains itself", and then he quotes certain sayings of the Prophet.

7. *Ibid.*, Vol. IV, 7.

8. *Ibid.*, 245.

9. *Ibid.*, Vol. II, 64.

10. *Ibid.*

11. *Ibid.*, 69. Here the term *'ummiyya* has not been translated in the usual literal sense, but in what it means in Shāṭibī's system of thought, especially in his theory of meaning.

12. *Ibid.*, 274-275.

13. *Ibid.*, 136.

14. *Ibid.*

15. *Ibid.*, 58. *Ma'ṣūm* is usually translated as "infallible", but in Shāṭibī's terminology, as he himself has explained, it means "protected", not "infallible".

16. *Ibid.*, 59.

17. *Al-I'tiṣām*, Vol. I, 19.

18. *Al-Muwāfaqāt*, Vol. I, 31.

19. *Ibid.*

20. *Ibid.*, pp. 29ff.

21. *Ibid.*, Vol. I, 19-20.

22. *Ibid.*

23. *Ibid.*, Vol. III, 346.

24. *Ibid.*, 103-104.

25. Shāṭibī's statement that "God revealed all that they needed", may be understood that nothing outside the Qur'ān belongs to *sharī'a* and secondly that there were things that God did not reveal because they were not needed. Apparently

these statements reject any need of legal change.   To be meaningful, these statements must be understood together with Shāṭibī's distinction between *'ādāt* and *'ibādāt*. Thus totality and completion in reference to *'ibādāt* means that entirety of rulings concerning *'ibādāt* have been revealed and that nothing else by way of *'ibādāt* is further needed.   The totality, in reference to *'ādāt* means that the totality of basic principles or universals have been revealed, the particulars of which will, however, always require *ijtihād*.

26.   *Al-Muwāfaqāt*, Vol. IV, 233-39.

27.   *Ibid.*, 236.

28.   *Ibid.*, Vol. II, 247.

29.   *Ibid.*, 180.

30.   *Ibid.*, 177-79.

31.   *Ibid.*, Vol. IV, 244-46.

32.   *Ibid.*, 272ff.

33.   *Ibid.*, 274, 276.

34.   *Ibid.*, 281.

35.   *Ibid.*, Vol. II, 58-61.

36.   *Ibid.*, Vol. IV, 151.

37.   *Ibid.*, pp. 144-45.   Ṣūfīs' views on *rukhṣa* are discussed in *al-I'tiṣām*, Vol. 1, p. 169.

38.   *Al-Muwāfaqāt*, op. cit., Vol. 1, pp. 104.

39.   *Al-Mi'yār*, op. cit., vol. VI, p. 254-270.

40.   *Ibid.*, p. 267.

41.   *Al-Muwāfaqāt*, Vol. IV, p. 141.

42.   *Ibid.*

43.   *Al-Mi'yār*, op. cit., pp. 254-280.

44.   *Ibid.*, p. 254.

45.   *Ibid.*

46.   *Ibid.*, and *Nayl* op. cit., p. 262.

47.   *Al-Mi'yār*, op. cit., p. 261ff.

48.   *Ibid.*, p. 274.

49.   *Ibid.*

50.   *Ibid.*, p. 271.

51.   *Al-Muwāfaqāt*, Vol. IV, p. 118.

52.   *Ibid.*, pp. 118-132.

53.   *Ibid.*, pp. 211-214.

54.   *Ibid.*, Vol. III, p. 96.

55.   *Ibid.*, Vol. III, p. 119ff.

56.   *Ibid.*, Vol. IV, p. 127.

57.   *Ibid.*, p. 144ff.

CHAPTER EIGHT

MAQĀṢID AL-SHARĪ'A

As argued in the preceding chapters, Shāṭibī's Philosophy of Islamic law has *maqāṣid al-sharī'a* or the ends and goals of Islamic law as its basic doctrine. We have also discussed that this doctrine is a continuation and development of the concept of *maṣlaḥa* as expounded in pre-Shāṭibī period. In his contemplations about Islamic law he came to the conclusion that the unity of Islamic law meant unity in its origins but more so in the unity of the intent of Law.   In order to establish the latter Shāṭibī expounded the doctrine of *maqāṣid al-sharī'a* explaining that the goal or end of law is one and that is *maṣlaḥa* or the good and welfare of human being.

This thesis of Shāṭibī, however, touched upon some theological issues in which many Ash'arī theologians would disagree with him. Consequently Shāṭibī set out first to establish this thesis of his. As a preamble to the exposition of *maqāṣid* doctrine, Shāṭibī argues that this doctrine is based on a generally agreed premise which is theological in its origin. The premise is that God instituted the *sharā'i'* (laws) for the *maṣāliḥ* (benefits, good) of the people, both immediate and future.(6)[1].   There exists, however, a difference of opinion among scholars concerning the details of this premise.   For the purpose of our discussion the point needs to be explained briefly.

The *mutakallimūn* (theologians) accept the general and apparent meaning of the premise of *maṣāliḥ*, yet they differ from one another if the

maṣāliḥ are understood in terms of *'ilal* (pl. of *'illa*) meaning "causes" or "motives". The Ash'arī theologians reject explicit as well as implicit causality in reference to God. For them, the premise implies that God is obliged by the consideration of *maṣāliḥ* to act in a certain way. Since such an obligation proposed limitation on God's omnipotence, the Ash'arīs reject the idea that the *maṣāliḥ* are the *'ilal* of *sharā'i'*. They, however, accept the premise by interpreting the *maṣāliḥ* to be the 'grace' of God, rather than the 'cause' of his acts. On the other hand, the Mu'tazila, even though they too maintained God's omnipotence, yet believed that God is obliged to do good. Consequently they accepted the above premise, regarding *maṣāliḥ* as the *'illa* of *sharī'a*.

The theological disagreement initially concerned God's acts, but it was extended to God's commands in the Qur'ān as they constitute His acts of speech. Thus the theological disagreement manifested itself in *Uṣūl al-fiqh* as well. Theological arguments penetrated into *uṣūl [al-fiqh]* also because a number of writers on *uṣūl* were theologians.

Uṣūl al-fiqh, however, required a manner of thinking and a method of reasoning different from that of *kalām*. Legal thinking necessitated that the volition for voluntary human acts must be attributed to man himself if man is to be held legally responsible for his acts. Since obedience to Divine Commands thus depends on human volition, the Command must be shown to be motivated by the consideration of human interests. Consequently, the premise of *maṣāliḥ* must be accepted in *uṣūl* in terms of "cause", "motive" and "purpose".

The premise of *maṣāliḥ* came to be generally accepted in *uṣūl*. Some *uṣūliyyīn*, such as Ghazālī and others, in order to be consistent with their theological views, redefined the term *'illa* so as to rid it of the connotation of "causality" and "motivation" in which sense it was used and disputed in *kalām*. Passing from *kalām* to *uṣūl*, the term *'illa* thus underwent a semantic change. For the explanation of the meaning it acquired in *uṣūl*, we now turn to Shāṭibī.

Shāṭibī explains that Rāzī[2] held that like His acts, God's commands also cannot be analyzed in terms of *'ilal* (causes) whereas the Mu'tazila believed that His Commands are caused (*mu'allala*) by the consideration of the *maṣāliḥ* of the people. The majority of the *fuqahā'* accepted the latter view in *fiqh*. Since it was inevitable that *'ilal* be established for

al-aḥkām al-shar'iyya (the rules of *sharī'a*), the *'illa* as used in connection with the *uṣūl* came to be interpreted as "the signs that make a rule known specifically" (6).

Shāṭibī argues that the premise of *maṣāliḥ* can be established in *sharī'a* by method of induction, both as a general theme in *sharī'a* and in the description of the *'ilal* of various commands in detail. For instance, the Qur'ān explains the reasons for ablution, fasting and *jihād* as being cleanliness, piety and eradication of oppression, respectively (7).

After explaining this premise, Shāṭibī proceeds to discuss the details of the *maqāṣid*, which are analyzed in five aspects; four in relation to the lawgiver, and one in relation to the *mukallaf* (subject of law).

Shāṭibī's doctrine of *maqāṣid al-sharī'a* is an attempt to establish *maṣlaḥa* as an essential element of the ends of law. He treats the problem of the relativity of *maṣlaḥa*, the relationship of *maṣlaḥa* with *taklīf* and *ḥuẓūẓ* in sufficient detail. He tries to refute the implications of theological determinism and the dilemma of the relativity of *maṣlaḥa* first by suggesting to study this problem on two levels. On the first level he discusses the *maqāṣid* of the lawgiver and on the second level he deals with the *maqāṣid* of the *mukallaf* (subject of law). By proposing that *maṣlaḥa* is the objective of the lawgiver on the first level, he suggests that it is the legislator who decides what is *maṣlaḥa*. Still, Shāṭibī stresses that this decision is not final for all times to come. But the objective of the *mukallaf* (the subject of law) which also includes the legislator, if and insofar as he is *mukallaf*, is obedience to the objectives of law.

The scheme of Shāṭibī's discussion of *maqāṣid* is as follows:

I. *Qaṣd* of the *Shāri'* (lawgiver/legislator's intent)

   (i) First aspect: The primary intention of the lawgiver in instituting law as such.

   (ii) Second aspect: His intention in instituting it so as to be intelligible (*ifhām*).

   (iii) Third aspect: His intention in instituting it to demand obligation (*taklīf*).

   (iv) Fourth aspect: His intention in including the *mukallaf* under its command.

II. *Qaṣd* of the *mukallaf*.

The discussion in the first aspect deals with *maṣlaḥa*, its meanings, grades, characteristics and its relativity or absoluteness. The second aspect discusses the linguistic dimension of the problem of *taklīf* which was overlooked by other jurists. A command constituting *taklīf* (obligation) must be understandable by all of its subjects, not only in words and sentences but also in the linguistic and cultural meaning of understanding. Shāṭibī discusses this problem by explaining two terms: *al-dalāla al-aṣliyya* (essential meaning) and *ummiyya* (intelligible to commonality). The third aspect analyses the notion of *taklīf* in reference to *qudra* (power), *mashaqqa* (hardship) etc. The fourth exposes the aspect of *ḥuẓūẓ* in relation to *hawā* and *taʿabbud*.

On the second level, i.e. that of *mukallaf*, Shāṭibī is largely concerned with the question of intention and acts.

The following chapters, therefor, eanalyse the following concepts and terms:

(1)   *maṣlaḥa* (chapter nine)
(2)   *dalāla* (chapter ten)
(3)   *taklīf* (chapter eleven)
(4)   *taʿabbud* (chapter twelve)
(5)   and *niyya*. (chapter thirteen)

NOTES

1.   The numbers in the parenthesis in the text of this chapter refer to the pages of *al-Muwāfaqāt*, Vol. II (Cairo: Muṣṭafā Muḥammad. n. d.).

2.   For Rāzi's views on This point see above pp. 157-59

CHAPTER NINE

MAṢLAḤA

The primary objective of the Lawgiver is the *maṣlaḥa*[1] of the people. The obligations in *sharīʿa* concern the protection of the *maqāṣid* of the *sharīʿa* which in its turn aims to protect the *maṣāliḥ* of the people. Thus *maqāṣid* and *maṣlaḥa* become interchangeable terms in reference to obligation in Shāṭibī's discussion of *maṣlaḥa*.

Shāṭibī defines *maṣlaḥa* as follows:

"I mean by *maṣlaḥa* that which concerns the subsistence of human life, the completion of man's livelihood, and the acquisition of what his emotional and intellectual qualities require of him, in an absolute sense" (25)[2].

This is the definition of *maṣlaḥa* in its absolute sense. Shāṭibī, however, takes into account various other senses in which *maṣlaḥa* can be studied. The *maṣāliḥ* belong either to this world or to the world hereafter. Further, these *maṣāliḥ* can be seen as a system; belonging to different grades and with a definable relationship with each other.

The second element in the meaning of *maṣlaḥa* is the sense of "protection of interests". Shāṭibī explains that the *sharīʿa* deals with the protection of *maṣāliḥ* either in a positive manner as when to preserve the existence of *maṣāliḥ*, *sharīʿa* adopts measures to support their bases.

Or in a preventive manner; to prevent the extinction of *maṣāliḥ* it adopts measures to remove any elements which are actually or potentially disruptive of *maṣāliḥ* (8).

Shāṭibī divides the *maqāṣid* or *maṣāliḥ* into *ḍarūrī* (necessary), *ḥājī* (needed) and *taḥsīnī* (commendable). The *ḍarūrī maqāṣid* are called necessary because they are indispensable in sustaining the *maṣāliḥ* of *dīn* (religion and the hereafter) and *dunyā*, in the sense that if they are disrupted the stability of the *maṣāliḥ* of the world is disrupted. Their disruption results in the termination of life in the world, and in the hereafter it results in losing salvation and blessings (8).

The *ḍarūrī* category consists of the following five: *Dīn* (religion), *Nafs* (self), *Nasl* (family), *Māl* (property) and *'Aql* (intellect) (i0).

Scholars, says Shāṭibī, have observed that these five principles are universally accepted. Analysing the aims of the *shar'ī* obligations, we find that *sharī'a* also considers them as necessary. The *shar'ī* obligations can be divided from the viewpoint of positive and preventive manners of protection into two groups. Falling into the positive manner group are *'ibādāt* (rituals, worship), *'ādāt* (habits, customs) and *mu'āmalāt* (transactions), and falling into the preventive group are *jināyāt* (penalties).

'Ibādāt aim at the protection of *dīn* (religion). Examples of *'ibādāt* are belief and the declaration of faith (the Unity of God, the Prophethood of Muḥammad), *ṣalāt, zakāt, ṣiyām* and *ḥajj*. *'Ādāt*[3] aim at the protection of *nafs* (self) and *'aql* (intellect). Seeking food, drink, clothing and shelter are examples of *'ādāt*. *Mu'āmalāt* also protect the *nafs* and *'aql* but through *'ādāt*. Shāṭibī defines *jināyāt* as those which concern the above five *maṣāliḥ* in a preventive manner; they prescribe the removal of what prevents the realization of these interests. To illustrate *jināyāt*, he gives example of *qiṣāṣ* (retaliation) and *diyāt* (blood money) for *nafs*, and *ḥadd* (punishment for drinking intoxicants) for the protection of *'aql* (8-10).

The *ḥājiyāt* are so called because they are needed in order to expand (*tawassu'*) the purpose of the *maqāṣid* and to remove the strictness of literal sense the application of which leads to impediments and hardships and eventually to the disruption of the *maqāṣid* (objectives). Thus if the *ḥājiyāt* are not taken into consideration along with the *ḍarūriyāt*

the people on the whole will face hardship. The disruption of *ḥājiyāt* is, however, not disruptive of the whole of *maṣāliḥ*, as is the case with the *ḍarūriyāt*. Examples of *ḥājiyāt* are as follows: in *'ibādāt*, concessions in *Ṣalāt* and *Ṣawm* on account of sickness or journey which otherwise may cause hardship in prayers, fasting, etc.; in *'ādāt*, the lawfulness of hunting; in *mu'āmalāt*, permission for *qirāḍ* (money lending), *musāqāt* (agrarian association) and in *jināyāt*, allowances for weak and insufficient evidence in decisions affecting public interest (10-11).

Taḥsīniyāt means to adopt what conforms to the best of customs (*'ādāt*) and to avoid those manners which are disliked by wiser people. This type of *maslaha* covers noble habits (ethics, morality). Examples of this type are as follows: in *'ibādāt*, cleanliness (*ṭahāra*) or decency in covering the privy parts of the body (*satr*) in prayer; in *'ādāt*, etiquette, table manners, etc.; in *mu'āmalāt*, prohibition of the sale of unclean (*najis*) articles or the sale of surplus food and water, and depriving a slave of the position of witness and leadership, etc.; for *jināyāt*, the prohibition of killing a free man in place of a slave, etc (11-12).

Shāṭibī regards the above division of *maṣāliḥ* as a structure consisting of three grades, connected to one another. His detailed analysis reveals two aspects of their relationships with one another. First, every grade separately requires annexion of certain elements which supplement and complement this grade. Second every grade is related to the others (12).

Every one of the three grades requires certain elements to achieve the fuller realization of its objectives. For instance, *qiṣāṣ* (retaliation) cannot be realized without a condition of *tamāthul* (parallel evaluation). This position, however, calls for two clarifications: first, a lack of these complementary elements does not amount to a negation of the essential objectives; second, the consideration and realization of the complementaries must not bring about a negation of the original objectives—that is to say, if the consideration of a complementary results in the annulment of the original objective, its consideration will not be valid. The reasons for this stipulation are, first, because the complementary element is like a quality (*ṣifa*). If the consideration of a quality results in the negation of the qualified object (*mawṣūf*), the qualification is negated as well. Second, even if it is supposed that the consideration of the complementary results in the realization of its interests at the cost of the original objective, it is stressed that the realization of the original be preferred (14).

The above situation is illustrated by the following example. The eating of carrion is allowed in *shari'a* to save life. The reason is that the preservation of life is of utmost importance, and preservation of *murū'a* (manliness, honour) is only complementary (*takmili*) to the protection of life. Impure things are prohibited in order to preserve honour and to encourage morality. But if the preservation of the complementary, i.e. to preserve honour by avoiding eating impure things, leads to the negation of the original interest, i.e. the preservation of life, the consideration of the complementary is forsaken.

Another example may be seen in the act of sale which is a *ḍarūrī maṣlaha* while the prohibition of risk and ignorance in sale transactions is complementary. If the complete negation of risk is stipulated, the result will be complete negation of the act of sale.

The relationship of the above three grades of *maṣāliḥ* with one another is the same as that of the complementary *maṣāliḥ* to the original objective of the law. The *tahsīniyāt* are thus complementary to the *ḥājiyāt* which are complementary to the *ḍarūriyāt*. The *ḍarūriyāt* are the fundamentals of *maṣāliḥ*. In view of the above explanation, Shāṭibī deduces the following five rules in this relationship:

1. The *ḍarūrī* is the basis of all *maṣāliḥ*.

2. The *ikhtilāl* (disruption) of *ḍarūrī* necessitates the *ikhtilāl* of other *maṣāliḥ* absolutely.

3. The *ikhtilāl* of other *maṣāliḥ*, however, does not necessitate an *ikhtilāl* of, and within, the *ḍarūrī* itself.

4. In a certain sense, however, the *ikhtilāl* of *taḥsīnī* or *ḥājī* absolutely necessitates the *ikhtilāl* of *ḍarūrī*.

5. The preservation (*muḥāfaẓa*) of *ḥājī* and *taḥsīnī* is necessary for the sake of *ḍarūrī* (16-17).

These rules may be illustrated by the rule of *qiṣāṣ* (lex talionis). *Qiṣāṣ* is *ḍarūrī*, and *tamāthul* (consideration of equality) in *qiṣāṣ* is *taḥsīnī* and *takmīlī*.

To illustrate the first rule, *tamāthul* (*taḥsīnī*) is complementary and exists only because of *qiṣāṣ* (*ḍarūrī*). Thus a *ḍarūrī maṣlaha* (*qiṣāṣ*) is the basis of a *taḥsīnī maṣlaha* (*tamāthul*).

To illustrate the second rule, if there is no *qiṣāṣ*, there is no consideration of *tamāthul*. In other words, the *ikhtilāl* of the *ḍarūrī* means the same for the other grades of *maṣāliḥ* necessarily.

To illustrate the third rule, the *ikhtilāl* of *tamāthul* does not require *ikhtilāl* of *qiṣāṣ*.

The fourth and fifth rules can be appreciated if one grasps the sense in which *ḍarūrī* is affected by the *ikhtilāl* of other *maṣāliḥ*. Shāṭibī explains the effect of other *maṣāliḥ* on *ḍarūrī maṣāliḥ* with the following four similes:

1. The relationship of other *maṣāliḥ* to *ḍarūrī maṣāliḥ* is like that of protective zones (*ḥimā*). The interruption (*ikhlāl*) of one protective zone amounts to the interruption of the next zone and eventually to the disruption of the *ḍarūrī maṣāliḥ* which are at the centre of these zones.

2. This relation may also be understood as that of the part and the whole; other *maṣāliḥ* together with the *ḍarūrī maṣāliḥ* make one whole. The disruption of the parts obviously means the same as the disruption of the whole.

3. The *ḥājiyāt* and *taḥsīniyāt* can be understood as individuals in relation to the universal, i.e. *ḍarūriyāt*.

4. The *ḥājiyāt* and *taḥsīniyāt* serve the *ḍarūrī maṣāliḥ* as a prerequisite (*muqaddima*), or as interrelated (*muqārin*) (16-24).

As mentioned above, the *maṣāliḥ* are also divided into those belonging to this world and those which concern the Hereafter.

First are the *maṣāliḥ* of this world. There are two angles from which the *maṣāliḥ* of this world can be observed. The first angle is to observe them as they actually exist, and the second is to observe them on the basis of *shar'ī* proclamation.

Examining *maṣāliḥ* as they exist in this world, we see that they are not found as pure *maṣāliḥ*. Rather, they are mixed with discomfort and hardship, however big or small, and which may precede, accompany or follow the *maṣāliḥ*. Similar are the *mafāsid* (opposite of *maṣāliḥ*) which also are not pure but are found to be mixed with a certain amount of comfort and enjoyment. The entire phenomenon in this world points to the fact

that this world is created from a combination of opposites and that it is impossible to abstract (*istikhlāṣ*) only one side. It is for this reason that the *maṣāliḥ* and *mafāsid* in this world are known only on the basis of the pre-dominant side; if the side of *maṣlaḥa* dominates, the matter at issue is considered, customarily, a *maṣlaḥa*; otherwise a *mafsada*. In these matters thus, the determining factor is the prevalent custom (*'āda*) (26).

It must be noticed here that this principle is applicable only to acts relating to *'āda*, and only to the determination of *maṣlaḥa* or *mafsada* in this world through knowing them as they exist. Acts which are not *'ādāt* are not affected by this principle (26).

The second approach to considering the *maṣāliḥ* of this world is to observe them in reference to their connection with *shar'ī* proclamation (*khiṭāb*). The basic rule in this approach is that the *maṣāliḥ* or *mafāsid* as taken into consideration by the *Shāri'* are pure. If they are supposed to be mixed (*mashūba*,) they are not so in the reality of *shar'* (27). As explained above, *maṣlaḥa* or *mafsada*, in this world, is determined by the predominant side (*al-jihat al-ghāliba*) of a matter. It is the predominant part which is the object of *shar'ī* proclamation. The dominated (*al-maghlūba*) part, whether *maṣlaḥa* or *mafsada* is not the objective of the *Shāri'*. Why is it then that the dominated elements, even though they may be *maṣlaḥa*, are not the objectives of *sharī'a*? On the other hand, how can they, when they are not the objectives of *sharī'a*, still be *maṣlaḥa*? Shāṭibī solves this apparent contradiction with the following explanation.

He argues that *al-maṣlaḥa al-maghlūba* is that which is considered as such according to the acquired habitude (*al-i'tiyād al-kasbī*) alone, i.e. without adding the *shar'ī* requiremens of *maṣlaḥa*. Customarily such a *maṣlaḥa* is not considered worth seeking. This is the part of *maṣlaḥa* which is also not the objective of the lawgiver insofar as the *shar'iyya* (legality) of rules (*aḥkām*) as a whole is concerned.

Further, if the dominated part were also taken into account by the *Shāri'*, no act could have been the subject of command alone or of prohibition alone. Obviously such is not the case. If it is supposed that the dominated part in a mixed *maṣlaḥa* is the object of prohibition and the dominating part that of command, then one and the same act becomes the object of command and prohibition at one and the same time, which would have been a *taklīf mā lā yuṭāq* (impossible obligation) as well as an absurd situation (28).

The above explanation, however, does not clarify the existence or occurrence of *mafsada* despite the *Shāri'*'s intention to the contrary. Shāṭibī elaborates the matter further by saying that the above position may appear to be that of the philosophers and of the Mu'tazila on the existence and occurrence of evil. According to the philosophers, God created a world in which the good is mixed with evil. It is the good, however, which is the purpose of creation. He did not create the world for evil, even though evil may occur along with the good.

The Mu'tazila believed that evils are not intended to occur; their occurence is against God's will (*irāda*).

Shāṭibī first refutes the apparent similarity between his and the above positions. He argues on the basis of a distinction between two intentions (*qaṣd*) of God. First there is the intention of creation (*al-qaṣd al-khalqī al-takwīnī*) and second the intention of legislation (*al-qaṣd al-tashrī'ī*). The positions of the philosophers and the Mu'tazila concern the former and Shāṭibī's the latter. As he argues, the occurrence of *mafsada*, despite God's will and intention for *maṣlaḥa*, is justifiable in the case of *al-qaṣd al-tashrī'ī*, because a man is held free (*mukhtār*) so as to be legally responsible for his acts. This position is not justified in the case of *al-irāda al-takwīniyya*, as this would imply imperfection in God's powers (30).

The above discussion of *maṣlaḥa* has been concerned with the cases where the actual practice may be used as the basis of determining a *maṣlaḥa*. There are cases where the judgment of habitude is not so definitive. For instance, eating carrion in case of dire need and killing a murderer for the prevention of crimes, are considered *maṣlaḥa* despite the fact that the acts themselves are not so. In other words, unlike the cases in the above discussion where the acts, despite their consisting of certain aspects of *mafsada*, are regarded as *maṣlaḥa* in themselves on the whole, the acts in the above examples, though *mafsada* in themselves, become *maṣlaḥa* because of certain external considerations. The supposition in this case is that the external consideration can dominate the internal consideration. How this domination is decided needs elaboration.

In view of the above situation, logically, there are two positions; either both considerations are equal in such a manner that one cannot be preferred to the other, or one of them can be preferred. The former

position probably does not exist in *sharī'a*, because it necessitates that *sharī'a* should intend prohibition and permission simultaneously.

Furthermore, if one side is preferrable, it is still possible that the *Shāri'* might have intended the other side. Both sides will always remain to be weighed by a *mujtahid*. We are obliged only to do what, after weighing both sides, appears to us (*yanqadihu*) the intention of the *Shāri'*, not what is intended by the *Shāri'* in reality (in His mind) (31). In this way, after the decision of a *mujtahid*, the possibility of the other side being intended has to be disregarded insofar as fulfilling an obligation is concerned. The possibility is, however, not finally disregarded insofar as *nazar* (examination, investigation) is concerned.

A group of scholars who believed the above possibility to be applicable in the case of obligations as well, maintained the principle of *murā'āt al-khilāf*. As mentioned elsewhere, this principle, to Shāṭibī, meant an impossible and hence void obligation.[4]

Shāṭibī sums up the above discussion by saying that *al-jihat al-marjūha* (the dominated aspect), when it is found mixed with *al-jihat al-rājiha* (the dominating aspect), is not the objective of a legal obligation. This principle governs all problems which are subject to *ijtihād* (legal reasoning) irrespective of whether one believes a *mujtahid* to be always correct or not. Hence reasoning by analogy must go on (*al-qiyās mustamirrun*) and the demonstrative proof must remain free and unqualified (*al-burhān mutlaqūn*) (32).

So far the discussion has been concerned with the *maṣāliḥ* of this world. The *maṣāliḥ* of the hereafter are also pure (such as the blessings of paradise) as well as mixed (*mumtazija*) such as the punishment of hell sometimes meted out even to those who believe in the unity of God.

The basic rule in such *maṣāliḥ* and *mafāsid* is that they are all determined according to *sharī'a*, because the reason has no place in matters relating to the hereafter.

Sometimes a confusion may arise because of considering the pure *maṣāliḥ* or *mafāsid* as mixed. For instance the blessings bestowed upon the prophets in paradise differ from those given to others. Those in lower ranks may be regarded as being punished by the absence of the blessings given to those in higher ranks. According to Shāṭibī, this confusion

arises because a distinction is not maintained between species and their individual exemplifications. The individuals may differ in special characteristics, etc., but they do not differ in relation to their species; they are all equal as members of the species. This mebership is the fact that determines their *waṣf* (quality) (36).

From the above discussions, Shāṭibī deduces the following rules as characteristics of *maṣlaḥa*:

1. The purpose of legislation (*tashrī'*) is to establish (*iqāma*) *maṣāliḥ* in this world and in the hereafter, but in a way that they do not disrupt (*yakhtall*) the system of *shar'*.

2. The *Shāri'* intends the *maṣāliḥ* to be absolute.

3. The reason for the above two considerations is that *sharī'a* has been instituted to be *abadī* (eternal, continuous), *kullī* (universal) and *'āmm* (general) in relation to all kinds of obligations (*takālif*), *mukallafīn* (subjects of law) and *ahwāl* (conditions, states) (37).

The above three characteristics thus require *maṣlaḥa* to be both *mutlaq* (absolute) and *kullī* (universal). The absoluteness means that *maṣāliḥ* should not be relative and subjective. Relativity is usually based on equating a *maṣlaḥa* with one of the following: *ahwā' al-nufūs* (personal likings), *manāfi'* (personal advantages), *nayl al-shahawāt* (fulfilment of passionate desires) and *aghrād* (individual interests). According to Shāṭibī all of the above consideratoins render the concept of *maṣlaḥa* relative and subjective, which is not the consideration of *Shāri'* in *maṣlaḥa*, though it may be so in *'āda*.

He argues on the following grounds: First, the objective of *sharī'a* is to bring the *mukallafīn* out of the dictates of their desires so as to make them servants of God. This objective negates the consideration of personal liking as an element in the consideration of *maṣlaḥa*.

Second, the *maṣāliḥ* cannot be considered as mere *manāfi'* beause in *'āda* as well as in *shar'* they are mixed with disadvantages. The point of emphasis here is that *naf'* is not essential in the consideration of *maṣāliḥ* in *'āda* nor is it in *shar'*.

In *'āda* some higher goal like the subsistence of life constitutes the basic consideration in determining *maṣlaḥa*. In *shar'* the consideration must still be higher, and that is the consideration of the hereafter.

Third, the consideration of the fulfilment of personal desires also renders the concept of *maslaha* highly relative. The consideration of personal desire varies from state to state, person to person, and time to time. It is so relative that it cannot be a criterion for determining *maslaha*.

Fourth, consideration of individual interests leads not only to a divergence but, more significantly, also to a conflict with others and to the deprivation of others' interests.

Consequently, relativity and subjectivity are excluded from the *shar'i* consideration of *maslaha*; it must, therefore, be absolute. In *shar'* this absoluteness is provided by the stipulation that *maslaha* must aim at the subsistence of life in this world commensurately with life in the next world.

The second characteristic of *maslaha* is its universality (*kulli*). This universality is not affected by the *takhalluf* (falling short) of its particulars. For instance, the penalties are imposed on the basis of the universal rule that they generally restrain people from committing crimes. Yet, there are people who, despite being punished, do not abstain from committing a crime. Nevertheless, such exceptions do not affect the validity of the general rule about the penalty (52). In *shari'a* it is *al-ghālib al-aktharī* (the major dominant) which is the general-definitive element (*al-'āmm al-qaṭ'ī*) in the consideration of a *maslaha*. This is the characteristic (*sha'n*) of inductive universals (*al-kulliyāt al-istiqrā'iyya*). An illustration of this universal may be found in the universal rules of a language. The universals of a language are closer to those of *shari'a*, because both are *waḍ'ī* (instituted, conventional) not *'aqlī* (speculative). The inductive universals (in Arabic grammar, for instance) remain valid even if some of their particulars do not conform to the majority of particulars (52-53).

In reference to the characteristics of *maslaha*, Shāṭibī takes into consideration the criticism of this concept by other jurists. Among them he specifically refers to Fakhr al-Dīn al-Rāzī, Shihāb al-Dīn al-Qarāfī and Ibn 'Abd al-Salām. He has answered their criticism. As these criticisms and answers are quite relevant to the discussion of *maslaha*, a brief summary of this debate is given below.

Analysing the position of those who favour *maslaha*, Rāzī refers to their argument that the basic rule in *manāfi'* (useful things) is *'idhn* (permission, lawfulness) and in *maḍarr* (harmful things) is *man'* (abstention) (40).

Shāṭibī rejects this analysis as an unfaithful representation of the *maslaha*-view. It is possible to speak about *manāfi'* and *maḍarr* only in absolute terms as they do not exist as absolute in reality; actually they are largely relative. Second, since the *maṣāliḥ* refer to *shar'i* proclamations which take into consideration the differences among persons, times and states, it is inadequate to talk in absolute terms. Third, since no *manāfi'* are to be found that are not mixed with *maḍarr*, if we accept Rāzī's principle, we will have also to accept that *'idhn* and *nahy* (prohibition) can apply to one and the same thing—which is absurd.

Shihāb al-Dīn al-Qarāfī, the commentator on Rāzī's *al-Maḥṣūl*, had some doubts about the principle that *maslaha* constituted the basis of legal obligations. He argued that *maslaha* cannot be the basis of *ibāḥa*. This is so first, because *maslaha* cannot be realized and hence defined in simple and absolute terms, because no *maslaha* can be gained without *'alam* (pain) and *mafāsid* (evils). Thus to maintain that every *mubāḥ* must be based on *maslaha* amounts to a complete negation of *mubāḥ*. Second, in order to argue that *maslaha* is the basis of obligation, *maslaha* must be defined in absolute terms and not in reference to certain specific factors, because this process of preference of one specific consideration to another is never ending and because it does not provide a universally accepted basis of definition. Furthermore, this position cannot be supported on the grounds that *maslaha* is that whose violator is punished by God. This definition is not acceptable because it is based either on the assumption that God punishes only evil and this manner of argument is *dawr* (arguing in circle) or on the assumption that every obligation from God is a *maslaha*, simply because it is an obligation.

Qarāfī adds that the *maslaha* view is difficult to maintain for our people (*aṣḥābunā* [*ash'arīs?*]), as well. They cannot say that God takes *maslaha* into consideration over against *mafsada*, because there are many *mubāḥāt* in which this consideration is lacking. The only proof they have is an argument on the basis of the induction of the obligations, and this also is based on a claim to know the *asrār* (secrets, rational explanation) of *fiqh*. They are thus necessarily led to the position that God's actions, commands and considerations are entirely dependent on His will and nothing else. The Mu'tazila were also led to the same conclusion (42).

To answer Qarāfī, Shāṭibī refers to his own discussion of the relativity of *maslaha*. Second, he answers that a survey of the rules of *shari'a* by the method of induction proves that *shari'a* has taken into con-

sideration what is regarded as *maṣlaḥa* in customary practice as well. He argues that such a survey on the basis of the method of induction provides the *ḍawābiṭ* (determining factors) of *maṣlaḥa*. The examination of the events by way of induction where *al-takālīf al-sharʿiyya* (legal obligations) have been realized in practice shows that these *takālīf* and *mubāḥāt* did not harm human interests (or *maṣāliḥ*) but have conformed to them and established them.

Ibn ʿAbd al-Salām distinguished between *maṣāliḥ al-dār al-ākhira* and *al-maṣāliḥ al-dunyawiyya* on the basis that the former can be known only by *sharʿ* while the latter are known by needs, experience, custom and by considerations of probability. He even says that when one wants to know a *maṣlaḥa,* he may simply find it rationally, supposing that the *Shāriʿ* has given no indication. Judgment is reached rationally in this manner except in the case of *taʿabbudāt* where *maṣāliḥ* or *mafāsid* are not given.

Shāṭibī, quoting Ibn ʿAbd al-Salām here, probably to indicate his disagreement, refers to him not by name but by terms such as *baʿḍ al-nās* (some person)and *hādhā al-qāʾil* (this speaker). To Shāṭibī *maṣāliḥ* in the hereafter are not independent of the *maṣāliḥ* of this world. Hence not only *al-maṣāliḥ al-ukhrawiyya* but also the *dunyawiyya,* as long as they are obligations, are known by *sharʿ* alone. If the distinction between the two *maṣāliḥ* were absolute, the *sharʿ* would have been concerned only with *al-maṣāliḥ al-ukhrawiyya*. In fact, to realize the *ukhrawiyya,* the establishment of the *dunyawiyya* is inevitable. Shāṭibī refutes the implication in Ibn ʿAbd al-Salām's statement that the *dunyawiyya* are rational and hence the consideration of *sharʿ* is only supplementary (48).

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NOTES

1. For the meanings and definitions of the term *maṣlaḥa* see chapters four and five.

2. The numbers in the parenthesis in the text of this chapter refer to the pages of *al-Muwāfaqāt*, Vol. II (Cairo: Muṣṭafā Muḥammad, n.d.).

3. Shāṭibī's definition and discussion of the term *ʿāda* are analysed in chapters eleven and fourteen.

4. Shāṭibī's views on *murāʿāt al-khilāf* have been discussed in chapter seven.

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CHAPTER TEN

LANGUAGE AND LAW

The preceding chapter discussed Shāṭibī's views on *maṣlaḥa* as being the primary objective of law. Shāṭibī proceeds further to argue that the second *maqṣid* of *sharīʿa* is its intelligibility; *sharīʿa* was revealed in such a manner that it was to be intelligible for every *mukallaf*. Although Shāṭibī does not say so explicitly, his analysis of *dalāla* develops an argument against the Ẓāhirīs and the Ḥadīth-group who discouraged any interpretation of *sharīʿa* on the basis of *maṣlaḥa*. Ẓāhirīs attach more significance to the letter of the law (*lafẓ:* words) than to the spirit of the law (*maʿnā:* meaning). Shāṭibī, on the contrary contends that it is the meaning which is important, and not the word. Thus, he indirectly leads to the conclusion that interpretation of *sharīʿa* by *maṣlaḥa* serves to fulfil the objectives of *sharīʿa*.

The idea of *sharīʿa* being universally intelligible has been accepted generally. There have been, however, some points which had posed some difficulty for the scholars. One such point was the question of foreign words in the Qurʾān. Generally, the jurists found it necessary to reject the foreign origin of these words in order to maintain that the Qurʾān was revealed in pure Arabic. Before proceeding to discuss his theory of *dalāla* (indication of words to meaning), Shāṭibī first discusses the problem of foreign words in the Qurʾān.

Shāṭibī opens his discussion by analysing the very fact of revelation in Arabic. He explains that in the claim 'that the *sharī'a* is all Arabic and there is nothing *a'jamī* (foreign) in it', the point of emphasis is not on the question whether there are foreign words in the Qur'ān or not. Unfortunately, many a jurist has understood the problem in this sense. In fact, the point to be stressed is that the Qur'ān was revealed in the language of the Arabs as a whole, and it is in this general sense that the *sharī'a* aims to be understood. It was revealed in such a manner that the particular words and styles of expressing the meanings were the same as used and understood by the Arabs. For instance the Arabic language uses *'āmm* (general) sometimes to mean *ẓāhir* (apparent), sometimes to mean *'āmm* in one sense and *khāṣṣ* in another sense, and sometimes to mean *khāṣṣ* only. The Qur'ān follows the same styles of expression. In other words every language has particular styles of expression, and styles of one language cannot help in understanding another language. The language of the Arabs cannot be understood on the basis of the language of non-Arabs. Similarly, the language of Arabs cannot help in understanding non-Arab languages. Shāfi'ī noticed this aspect of *sharī'a* and stressed its significance for *uṣūl al-fiqh*, but the later jurists have generally overlooked this aspect (66).[1] Shāṭibī retakes from Shāfi'ī and develops the theme of the universality of the understanding of *sharī'a* by an analysis of the meaning-indication process in the Arabic language.

Shāṭibī's discussion of the universality of the intelligibility of *sharī'a* does not seem to solve directly the contradiction which emerges in case of those who know no Arabic. We may, however, infer from the general trend of his argument two levels of the universality of intelligibility which may serve as an indirect answer to the question. On the first level the universality of intelligibility is confined to Arabs. Shāṭibī maintains that *sharī'a* is cast in a language which is understood by all Arabs and it is in this sense that it is Arabic. On the second level *sharī'a* is universally intelligible, even by the non-Arabs. Here, intelligibility refers to a more special sense of 'meaning'; it does not refer to the indication by words, syntax or grammar. This is the special sense of 'meaning' in which the meaning is separated from words, syntax, grammar, etc., and thus, actually goes beyond any language. In this state of abstraction they are ready to be understood by speakers of all languages. These meanings are ready to be translated into other languages. This 'meaning' nevertheless, initially comes from the first level of intelligibility which is achieved from the context of a speech in a particular language.

Shāṭibī calls the process, which indicates this special 'meaning', *al-dalāla al-aṣliyya* which may explain how Shāṭibī proposes that *sharī'a* can be understood even by those who do not know Arabic. *Al-dalāla al-aṣliyya* is explained in detail as follows.

The Arabic language, insofar as it consists of words to express meanings, has two aspects:

First, the absolute aspect of its words and expressions which denote absolute meanings. This denotation is *al-dalāla al-aṣliyya* (essential denotation). Second, the limited aspect in which the words and expressions denote subsidiary meanings. This denotation is *al-dalāla al-tābi'a* (subordinate denotation).

The first aspect is common to all languages and is the ultimate aim of a speaker. For instance, if A performs a certain action, let us say standing, all languages can state this fact. Although with different words, yet all languages will state the same fact. It is in this aspect that statements in one language can be translated into another. This is the sense in which one speaks of universal meaning of a language (66).

The second aspect concerns particular languages, in this case Arabic. The statement *"qāma Zaydun"*, will vary depending on the emphasis on subject, predicate, condition, context and on the variations of styles. As examples may be given the following: *Zaydun qāma; Inna Zaydan qāma; Wallāhi inna Zaydan qāma; Qad qāma Zaydun; Innamā qāma Zaydun*, etc. (67).

These kinds of variations, though they change the meanings and emphasis in a statement, are, nevertheless, not the original objective (*al-maqṣūd al-aṣlī*) of the speaker, but rather they are supplementary and ameliorative to the essential meaning. This, however, does not mean that they are to be disregarded. Rather they are to be taken together with the first aspect of indication as attributes (*awṣāf*) of the essential meaning. These attributes depend on the essential meaning and they will be disregarded if the essential meanings exist no more or are disrupted (68).

To satisfy the requirements of universality and absoluteness in the intelligibility of *sharī'a*, it is necessary not only to confine the intelligibility to the essential meaning as evident from the context, but also to the fact that the meanings so found must accord to Arab usage. For

this the following two aspects may be considered as detrerminative factors: first the Arab usage in word-meaning relationship and second, the Arab intellectual milieu. The consideration of Arab usage is so essential that "if the Arabs have an incessant custom in their language, it cannot be validly disregarded in the comprehensibility of *sharī'a*, and if there is no such custom even then it is not valid to adopt for its comprehension something which is not well known to them (Arabs)" (82).

The Arab usage in this regard is that the words are not followed slavishly in their indication of meaning. The Arabs do not confine themselves to one and the same word, and the replacement of words does not seem to affect their statements. The above fact can be illustrated by the following examples.

The Arabs often disregard the general rules of language. For instance, they frequently employ the styles of poetry in prose, even though such a style is not required and despite the fact that it is contrary to prose styles. What is significant to note, however, is that customarily such a deviation does not seem to affect the speech (83).

Second, one of the characteristics of Arab usage is that they frequently replace original words with their synonyms, and this practice is not considered to imply contradiction or confusion in speech as long as the intended idea (*al-ma'nā al-maqṣūd*) subsists. The seven readings of the *Qur'ān* are examples to this effect.

Further, a number of evidences are found in the transmission of verses. For instance, Ibn al-A'rābī (d. 848), the famous linguist, once recited:

Wa mawḍi'in zīrin lā 'urīdu mabītahū
ka'annī bihī min shidda(t) al-raw'i anīsū

[I do not want to spend night in a place of *zīr* (like a conical jar), as if, because of intensive fright, I am familiar with it].

One of his listeners corrected, reminding him that on another occasion he had recited '*wa mawḍi'in ḍiqin*' (a narrow place) instead of '*wa mawḍi'in zīrin*'. Ibn al-A'rābī replied regretting that the enquirer had been with him for such a long time and yet did not know that '*zīr*' and '*ḍiq*' are one and the same (84).

Arabic poetry has been transmitted by varying reports and with a diversity of words. On the whole, one learns that the Arabs do not strictly adhere to a particular word specifically so as to regard synonymous words as weaker and defective. The few exceptions from this usage belong to peculiar cases where only one meaning is possible (84).

The Arabs often disregard part of the grammatical rules of a word, although never as a whole. An example of such disregard are the subtle rules (*al-aḥkām al-laṭīfa*) which the words demand according to theoretical analogy (*al-qiyās al-naẓarī*) but which are, nevertheless disregarded. To illustrate, Shāṭibī says that the words '*amūd* and *ya'ūd*, and *sa'īd*, strictly speaking, do not rhyme, yet they are often used to rhyme in Arabic poetry. The reason is that the Arabs' aim for the refinement of their language does not confine them to a pedantic concrern (*ta'ammuq*) for these rules (84).

The best appreciated piece of literature, according to the Arabs, is that which avoids unnecessary artificiality. When a poet is found pedantically indulging in refinement of his diction he is no more regarded as worthy to be followed (84).

To sum up, Arab usage pays more attention to meaning than to words, because "the word is only a means to reach the desired meaning, whereas the meaning is the goal" (87).

It must, however, be noted that not all the meanings of a word are intended at one time. Shāṭibī makes a distinction between *al-ma'nā al-ifrādī* (single meaning), and *al-ma'nā al-tarkībī* (contextual meaning). The *ifrādī* is disregarded whenever it does not agree with the latter (87).

The purport of the above discussion of meaning is Shāṭibī's contention that neither the words, nor even their abstract meanings are the goals of language in a speech. It is rather the meaning obtained within a context, written or oral, which is the goal. It is this sense of meaning, i.e. *al-dalāla al-aṣliyya*, which according to Shāṭibī assures the universal intelligibility of speech within the circle of the speakers of a certain language.

The second consideration for universal intelligibility is the consideration of the intellectual level of the addressees of a speech. Obligation depends on comprehension in the sense that one cannot be held responsible for more than he can understand. Comprehension, however, does not

depend simply on the familiarity of words and meaning, but also on many other things.

The degree of comprehensibility may differ from person to person in specific matters because men are not equal in their individual mental make-ups. They, however, come to agree with one another in general matters, and this is the condition according to which *maṣāliḥ* function in this world (85).

Since *sharī'a* concerned the *maṣāliḥ* of the Arabs who were *ummiy-yīn* (unlettered), the *sharī'a* had also to be *ummiyya*. Shāṭibī explains that *ummiyya* means that the Arabs did not possess the sciences of the Ancients (Greeks). Literally, *ummī* comes from *umm* (mother) to con-note one who remains as he was originally at the time of his birth, that is to say, in the state of not yet having learned anything (69).

To call the Arabs *ummiyyīn*, however, does not mean that they were completely ignorant and uncultured. On the contrary they did possess certain branches of knowledge such as astronomy, knowledge of weather, history and medicine etc. They also possessed their own code of ethics (71-79).

This consideration implies that in understanding the *sharī'a*, (parti-cularly as, in the case of exegesis of the Qur'ān, many scholars introduced matters which were not intelligible for the common people), one should not demand more than what *ummī*s can generally understand. This consideration would also require that the obligation whether pertaining to beliefs (*i'tiqādiyāt*) or to actions (*'amaliyāt*) must be within the intellectual capaicty of an *ummī*. Otherwise, obligations would concern only the elite and not people in general. If an obligation surpassing the intellectual capacity of all were made to apply to people in general, it would consititute an impossible obligation. Both of these consequences are absurd. This conclusion is strongly supported by the attitude of the companions of the Prophet who did not indulge in speculative discussions. Also in practical matters the *sharī'a* uses commonly observable facts rather than compli-cated speculations as criteria, as for instance, the rising or setting of the sun rather than an astronomically defined schedule of times of prayers. (90).

It must, however, be made clear that by insisting on the compre-hensibility of the *sharī'a* to *ummiyyīn*, Shāṭibī neither claims that every-

thing in the Qur'ān or *sharī'a* is and must be understood by an *ummī*, nor does he discourage any thinking or action beyond the comprehensibility of an *ummī*. Rather what he stresses is the rational and universal comprehensibility of obligation without which the sense of obligation is not complete. Additional considerations may supplement or refine the knowledge of an obligation but the absence of such considerations does not make it any the less obligatory. The question of comprehension is restri-cted furthermore, to those matters which are relevent to the fundamentals of *sharī'a* (*qawā'id al-sharī'a*) and has no meaning for theological matters (*umūr ilāhiyya*). The latter are additional matters which are not primarily obligatory (91).

NOTE

1. The numbers in the parenthesis in the text of this chapter refer to the pages of *al-Muwāfaqāt*, Vol. II (Cairo: Muṣṭafā Muḥammad, n. d.).

LEGAL OBLIGATION
AND
PHYSICAL CAPABILITY

This chapter discusses Shāṭibī's concept of *Taklīf* which is the term used for 'obligation' in *Uṣūl*. Etymologically the term has the implication of 'toil', 'pain' and 'hardship'. On the other hand the principle of the voidability of *taklīf mā lā yuṭāq* (obligation which is impossible to fulfil), which is theological in origin, does not encourage the literal meaning of *taklīf* to be extended. The discussion of the term *taklīf*, thus, naturally takes into account both of the above extreme aspects of obligation.

For a definition of *taklīf*, Shāṭibī, therefore, proceeds to an analysis of the terms *qudra* (capability) and *mashaqqa* (hardship). According to Shāṭibī *qudra* is an essential element in the concept of legal obligation. He says that the premise of his discussion of *taklīf* which is again theological in origin, is that the *sharṭ* (condition) or *sabab* (cause) of *taklīf* is the *qudra* capability of doing that for which one is obilged. Hence, any obligation which is not within the *qudra* of the *mukallaf*, is not valid according to *shar'*, though it may be so *'aqlan* (rationally) (107)[1].

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QUDRA

To define *qudra*, Shāṭibī chooses to analyse what is considered *ghayr maqdūr* (that which is not within the power of a man to do) in *Uṣūl*. Shāṭibī observes that *ghayr maqdūr* may be used in four senses. First, it may refer to those obligations which are impossible to fulfil (*mā lā yuṭāq*), because they are beyond human capability, as for instance the demand to give up eating or drinking : (108-109).

The second sense of *ghayr maqdūr* refers to obilgations which cannot be fulfilled because of the following reasons:

(a) Where the obligation concerns acts which depend on other acts in such a manner that the latter acts become means to realize the former (109).

(b) Where an act occurs as an inevitable consequence of a certain other act. This case may seem similar to (a), but, in fact, it is different, because in (a) one has to do a certain act before being able to fulfil the act which is obligatory, while in (b) one does not perform the obligatory act itself and only by performing the precedent act does the obligatory act come to occur inevitably. Shāṭibī illustrates it by the example of the obligation to know. Apart from *a priori* knowledge, other kinds of knowing occur inevitably following *naẓar* (observation, reasoning, syllogism) (111).

The other two senses with which the term *ghayr maqdūr* is associated are *mashaqqa* (hardship) and *ḥaraj* (impediment). Shāṭibī maintains that strictly speaking *mashaqqa* and *ḥaraj* are not *ghayr maqdūr*. He explains it by arguing that legal obligations in *sharī'a* are related with *mashaqqa* and *ḥaraj*, but not with the above-mentioned first and second senses of *ghayr maqdūr*, and since *sharī'a* is not *mā lā yuṭāq*, the *mashaqqa* and *ḥaraj* are not *ghayr maqdūr*.

Shāṭibī does not deny the fact that in *sharī'a* there are occasions where a command is apparently directed to a certain *ghayr maqdūr* act,

yet he maintains that the close examination reveals that the obligation is not actually related to the *ghayr maqdūr* act. He elaborates it in the following arguments.

Shāṭibī observes that, as a principle, the realm of *ghayr maqdūr* is not object of *taklīf*—whether in respect to demand or prohibition. If the apparent sense of a *shar'ī* command is to make the *ghayr maqdūr* obligatory, the command must be understood to refer to a *maqdūr* act which (or the mention of which) either precedes (*sābiq*) this *ghayr maqdūr* as a means or cause, or occurs simultaneously (*qarīn*) with it or succeeds (*lāḥiq*) it. To illustrate, the Qur'ānic command: "Do not die but as Muslims (lit. Do not die except if you are Muslims.)" [II:122], literally demands not to die, which is *ghayr maqdūr* to obey. Naturally the obligation must be connected with the phrase that follows the actual command, i.e. to be Muslims (108). This example shows that command may sometimes be related with *ghayr maqdūr* but that *ghayr maqdūr* is not obligatory.

There are further instances in *sharī'a* where a command is directly related with a *ghayr maqdūr* and even aims at it, yet it does not constitute the actual obligation. In such instances the *ghayr maqdūr* is capable of being the object of either the desire (*ḥubb*) or the detestation (*bughḍ*) of the *Shāri'*. Even though the acts which are *ghayr maqdūr* are neither within the capability of the *mukallaf* nor within his volition, yet they may be desired by the law-giver. To illustrate, Shāṭibī refers to the example of the obligation to know. If the object of knowing is something *ḍarūrī* (a priori), then there is no action involved to fulfil the obligation. In other cases, the knowing is a result of some other act, and even then, as mentioned earlier as well, it necessarily and immediately follows the act of arranging the premises. In short, the act of knowing itself is *ghayr maqdūr* and yet desired by the *Shāri'* (111).

In the latter category of *ghayr maqdūr*, Shāṭibī refers, in fact, to acts which are involuntary, being *fiṭrī* and *iḍṭirārī* and *musabbab* (110, 112).

Shāṭibī's argument is that such *ghayr maqdūr* acts as mentioned above, are not object of obligation, though they are desired by the law-giver. The fact that they are desired is proven either in literal expression by the law-giver to such effect or by his making it subject to *jazā'* (reward

and punishment) (112). On this point Shāṭibī's position rather appears puzzling. How an act despite being the object of *Shāri''s* desire and subject to *jazā'*, be not the object of obligation?

Shāṭibī explains his position by developing a distinction between the terms 'desire' and 'command' in the following manner.

The jurists have taken three positions in answer to the above question. One group has held that the reward and punishment do not concern the *ghayr maqdūr*. Another group believes that reward and punishment both are attached to the *ghayr maqdūr* at the same time.

The first group argues that since *ghayr maqdūr* acts are subject to obligation, they are not subject to reward or punishment. If there is no obligation, there can be no reward or punishment (115).

Shāṭibī refutes this argument by rejecting the assumption of the necessary relationship of reward and punishment to obligation. He illustrates his view with examples showing that there are obligations which entail no reward or punishment (117-118).

Another argument advanced in favour of the first position proceeds by showing contradiction in the second position. This argument is as follows. Reward and punishment, if their connection with *ghayr maqdūr* acts be accepted, will either concern the acts in question in their essence or in terms of related acts. If reward and punishment concern their essences, then no distinction is possible between one act and another and between reward and punishment. Consequently, both reward and punishment may concern one and the same act at the same time, which is impossible. If reward and punishment concern related acts, instead of essences, then the point is proven that in neither case does reward and punishment concern the *ghayr maqdūr* acts themselves (115).

Shāṭibī refutes this argument by showing that by not maintaining a distinction between reward and punishment in respect of one and the same act, the above argument implies that one and the same act can be the object of both desire and detestation of *Shāri'* at the same time, which is absurd.

He argues further that reward and punishment cannot be supposed to be concerned with related acts, in this case to the exclusion of the

act in queston. If a connection between *ghayr maqdūr* act and related act is necessary for reward and punishment, it only means that the *ghayr maqdūr* act is certainly effective in determining reward and punishment (118).

Shāṭibī, therefore, concludes that an act even though not object of obligation may still be subject to reward. Also, that being a subject to reward does not make an act to be the object of obligation. Thus a *ghayr maqdūr* may be desired or rewarded, yet it does not mean that it is obligatory. To be obligatory, an act must be *maqdūr*.

From here, Shāṭibī proceeds to an analysis of *mashaqqa* and *haraj* which, he maintains, are not to be equated with *ghayr maqdūr* in the senses which have been discussed so far. *Mashaqqa* and *haraj* make an act hard and difficult, but they are capable of being object of obligation. Shāṭibī, however, lays stress that acts consisting of *mashaqqa* and *haraj* may be object of obligation, yet *mashaqqa* and *haraj* are not objectives of obligation for their own sake. Shāṭibī develops his argument in a detailed analysis of the term *mashaqqa*.

MASHAQQA

Mashaqqa is often confused with *ghayr maqdūr*. The discussion below summarising Shāṭibī's views on this point, contends that a distinction among *taklīf mā lā yuṭāq*, *ghayr maqdūr* and *mashaqqa* must be observed. *Sharī'a* aims at none of them *per se*, but it does impose the latter though not the former (119). This discussion calls for an investigation into the meaning of *mashaqqa*.

Literally, *sh-q-q* as in *shaqqa 'alayya al-shay'* (The matter became difficult for me.), denotes something "tiresome" and "hard". The Qur'ān says, "You could not reach it save with great trouble to yoursleves (*bi shiqq al-anfus*) (17:7). This meaning when taken in the absolute sense — without reference to its conventional (*waḍ'ī*) meaning in Arab usage— acquires five particular technical (*iṣṭilāḥiyya*) senses. These five senses, in fact, stem from three considerations: (1) from the general literal sense of the word *mashaqqa*, (2) from the viewpoint of *'āda* i.e. whether a certain act is considered *mashaqqa* by *'āda* or not, and (3) from the concept of *taklīf* itself i.e. a *mashaqqa* is so neither in its literal sense nor in its customary sense but is rather derived from the concept of obligation itself. These three viewpoints provide the following five senses of *mashaqqa*.

1. First, in a very general sense, *mashaqqa* applies to all meanings of "toil" or "trouble" disregarding their being *maqdūr* or not, or being real or metaphorical. It is in this sense that *taklīf mā lā yuṭāq* is also called *mashaqqa*, because in order to fulfil a command which is supposedly *mā lā yuṭāq* man puts himself into vain trouble. For instance if a man tries to fly in the air his attempt will be in vain. But here a distinction must, however, be recognized; "flying in the air" is called *mā lā yuṭāq* not *mashaqqa*; *mashaqqa* is rather the effort made to achieve the end (i.e. to try to fly). Thus it becomes obvious that even linguistic usage associates *mashaqqa* with *maqdūr* only.

2. In the second sense *mashaqqa* is applied to those acts which are extraneous to the *mu'tād* (customary). That is to say to perform these acts customarily means to incur hardship upon oneself.

For instance, to observe fasting during sickness or a journey is not easy according to *'āda*, and thus it incurs *mashaqqa*. It is here that the *sharī'a* makes certain allowances which are called *rukhṣa* by the *fuqahā'*.

3. The third sense of *mashaqqa* is an extension of the second one. While the second concerns particular acts, the third concerns the totality of actions.

It is persistence in uninterrupted performance of acts, although initially easy to fulfil, that creates *mashaqqa* and makes them difficult to carry out. In such cases the *sharī'a* recognizes the principle of *rifq* (leniency, moderation) by commending the choice of alternative acts which are not tiresome.

4. In the fourth sense of *mashaqqa*, the hardship of an act does not result from its being against *'āda* but rather because it is additional to *'āda*. In other words customarily it is not *mashaqqa* but it becomes so because one is obliged to do it. It becomes *mashaqqa* also because it creates responsibility in addition to the acts required by this worldly life.

5. The fifth sense of *mashaqqa* also flows from obligation, but in a manner different from the fourth. Whereas in the fourth sense an act is *mashaqqa* merely because it is an obligation, there being an additional hardship other than this fact alone; in the fifth, there is an additional hardship. The additional element comes about because the *taklīf* requires one to reduce (*mukhālafa*) his own desires and it incurs toil and hardship, since hardship is quite evidently seen in prevailing customary practices (*al-'ādāt al-jāriya*) (119-121).

These five senses of *mashaqqa* constitute the framework for investigating whether *mashaqqa* is included under the requirement of obligation or not. Shāṭibī conducts his investigation by analysing the intention of the law-giver, the understanding of the term in *'āda*, and the intention of the *mukallaf*.

The first question is whether the *Shāri'* intends *mashaqqa* or not. There are two kinds of answers to this question. One is given through the *Shāri'*'s declaration of his own intentions, known through the Qur'ān or tradition. The second may be known through an analysis of the notion of

mashaqqa in *shar'* as distinguished from that in *'āda*. Both kinds of answers agree on the point that the *Shāri'* does not intend *mashaqqa per se*. The first kind of answer is manifested in the following:

(a) Various statements in the Qur'ān and Ḥadīth categorically deny any intention by the *Shāri'* to impose hardship (121-122).

(b) The existence of well-known allowances (*rukhaṣ*) in *shar'* prove the existence of concessions to remove hardship (122).

(c) The consensus on the absence of any intention by the *Shāri'* to make *shāqq* (hard) acts obligatory. If it were supposed that *sharī'a* did such a thing, it would be self-contradiction and hence self-negation; the *sharī'a* cannot and does not aim at both comfort and hardship at the same time (112-123).

The second kind of answer is sought by investigating the notion of *mashaqqa* in relation to *'āda*.

Not every bit of toil and hardship is called *mashaqqa* in *'āda*. For instance, seeking one's livelihood by following a craft and trading, although it involves toil (*kulfa*), is not called *mashaqqa*. Rather a person is reproached if he avoids such toils. All states of the human being in this world are toilsome (*kulfa*), yet they are not called *mashaqqa* (123).

A certain act is not called *mashaqqa* in *'āda* when "it is possible (*mumkin*) habitually (*mu'tād*) and the hardship (*kulfa*) entailed by the act does not interrupt the act in general practice (*fī'l-ghālib al-mu'tād*)" (123). In this sense *mashaqqa* in relation to *mu'tād* can be of two kinds: *al-Mashaqqa al-mu'tāda*, or the hardship entailed by an act which is possible to bear and within the capacity of man, although it is, in fact, hard for him; *Mashaqqa khārija 'an al-mu'tād*, or "when the perpetuation of a certain act leads to its discontinuation, wholly or partly, or results in a defect (*khalal*) in the doer of the act (*ṣāḥibuhū*) in his person, property or in his states" (123). Such acts are called *mashaqqa* and are extraneous to *mu'tād* because they are not possible to perform habitually.

Having established this distinction, Shāṭibī points out that the *mashaqqa khārija 'an al-mu'tād* is obviously not intended by *shar'*. Even *al-mashaqqa al-mu'tāda* is not intended by itself in an obligation. It is required rather because the obligation serves the *maṣlaḥa* of the *mukallaf* (124).

There are three possible objections to this position which are discussed in the following lines.

First is the fact that the very term, *taklīf*, which is used as an appellation for obligation entails the meanings of *kulfa* and *mashaqqa*. An act is demanded only insofar as it entails *mashaqqa*, and this is why it is called *taklīf*. Hence *mashaqqa* is the *maqṣūd* of the *Shāri'* (124).

Shāṭibī answers this objection by explaining that *taklīf* can be directed to the *mukallaf* in two aspects:

(1) First because *taklīf* is *mashaqqa* and (2) second because there is an immediate or forthcoming *maṣlaḥa* (good) to be achieved for the *mukallaf*. Shāṭibī obviously favours the second aspect as the only *maqṣūd* of the *Shāri'*. The first cannot be *maqṣūd* because both of these two aspects cannot exist togehter. The fact of *maṣlaḥa* being the *maqṣūd* has been established in the first section. Hence *mashaqqa per se* cannot be *maqṣūd*. Why, then, is an obligation called *taklīf*? Shāṭibī answers that, in the usage of Arabs, a thing derives its name from its inseparable attribute, although, in usage, this inseparable attribute is not intended. It is on the basis of this rule of *'ilm al-ishtiqāq* (etymology) that an act is called *taklīf* because it entails *kulfa* and *mashaqqa*, not because *taklīf* in the sense of *kulfa* is the aim or purpose of this act. The consideration of *kulfa* is possible only when the term *taklīf* is applied in a *majāzī* (metaphorical) sense to a certain act rather than using the term in its *ḥaqīqat al-waḍ' al-lughawī* (the essential posited meaning of a word in a language) (125-126).

(2) The second objection is that the *Shāri'* knows what a *taklīf* is and what it incurs, and since it is known that every *taklīf* incurs *mashaqqa* it follows that the *Shāri'* knows that a *taklīf* incurs *mashaqqa*. It is, therefore, evident that by imposing a *taklīf*, the *Shāri'* purposes also to impose *mashaqqa* (124-125).

Shāṭibī answers this objection by refuting the equation of the knowledge of *sabab* and *musabbab* with the *qaṣd* (intention). He argues that even if in this particular case knowledge of *sabab* and *musabbab* is considered as intention (*qaṣd*) it would be considered only as leading to the whole; the intention for *mashaqqa* is only secondary. But even within this supposition the position comes to a contradiction because, even though secondary, the intention for *mafsada* (*mashaqqa*) is posited together with

the intention for *manfa'a* (*maṣlaḥa*). Hence it is proven that the *Shāri'* does not intend *mafsada* i.e. *mashaqqa* (126-127).

Secondly, it is evident from the Qur'ān and other sources that the *Shāri'* intends to remove hardship. How can it be then maintained that the *Shāri'* intends to impose and remove *mashaqqa* at one and the same time?

To sum up the discussion, Shāṭibī maintains that:

"The obligation of *mu'tādāt* and the like does not entail *mashaqqa* as explained. Hence what necessarily follows from *taklīf* is not called *mashaqqa;* irrespective of whether the knowledge of its occurrence necessarily requires it or necessitates the intention for it." (127)

There is, however, another dimension of the problem. Granted that the *Shāri'* does not intend *mashaqqa* in his imposition of *taklīf*, should a *mukallaf* intend *mashaqqa* while fulfilling his obligations or not?

Shāṭibī's general answer is in the negative. The *mukallaf* should not intend *mashaqqa* because the *Shāri'* does not do so and because the *mukallaf's* intention must correspond to that of the *Shāri'*. Consequently the *mukallaf's* intention should be concentrated on act rather than on *mashaqqa* (128).

In details, however, the problem is more complicated when acts and *mashaqqa* are looked upon from different points of view.

First, the acts themselves, in this case, can be considered in two categories, those which are permissible and those which are not so (133). In the latter case, the intention to perform such acts is obviously forbidden. The problematic matter are those acts which are nothing but *mashaqqa* in themselves but which the *Shāri'* imposed as such, as for instance punishments (*'uqūbāt*). Shāṭibī maintains that even here the intention of the *Shāri'* is not to impose *mashaqqa* as such, but to acquire *maṣlaḥa* or to remove *mafsada* by this *mashaqqa*. Accordingly, the *mukallaf's* intention musts also be *maṣlaḥa* and not *mashaqqa* as such. This is the reason why if a *mashaqqa* (such as a *ḥalf* (oath) to bequeath all of one's property for charitable purposes) contravenes some *ḍarūrī* or *ḥājī* principle in *dīn* (i.e. the limitation of such a voluntary distribution to only one third of one's property), it will be deemed as void (149).

Next is the category of acts which are permissible. They are to be considered in relation to *mashaqqa* whether this *mashaqqa* is *ikhtiyārī* (by man's own choice) or *iḍṭirārī* (imposed on man not by his choice). Another point to be considered regarding *mashaqqa* is whether it is so called in *'āda* or not or whether it is extraneous to all such considerations (133). To simplify, we can divide Shāṭibī's discussion of *mashaqqa* into the following three categories:

(1) *Ikhtiyārī*, where the *mukallaf* intends *mashaqqa* by his own choice.

(2) *Iḍṭirārī*, where *mashaqqa* is an inevitable consequence of a certain act.

(3) *Khārijī*, where the *mashaqqa* is neither of the above but rather falls upon the *mukallaf* without having any connection with them.

We will deal with these three categories one by one.

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AL-MASHAQQAT AL-IKHTIYĀRIYYA

As already mentioned, Shāṭibī maintains that since *Shāri'* does not intend *mashaqqa per se*, one must not seek it as an objective. *Al-mashaqqat al-ikhtiyāriyya*, therefore, is condemnable according to him. There is, however, one point where one may argue that a *mukallaf* may intend *mashaqqa* to augment his reward on the assumption that reward is enhanced in commensuration with the hardship suffered (125).

Shāṭibī rejects this manner of reasoning. First, because, to him, the entire concern of *taklīf* is with action (*'amal*) and this is also that at which the *Shāri'* aims. It is, therefore, action and not *mashaqqa* which increases reward (127).

Secondly acts depend on intentions. The intention must, therefore, correspond to the intention of the *Shāri'* so as to produce acts which are intended by the *Shāri'*. To seek *mashaqqa*, in this case, would be to violate the intentions of *Shāri'*. This violation cannot earn reward (129).

In opposition to Shāṭibī's view a considerable number of traditions are quoted to the effect that a reward is connected with the hardship of the act, and the more the hardship the greater the reward (129-130).

Second evidence advanced to oppose Shāṭibī is the situation of *arbāb al-aḥwāl* (*ṣūfīs*) who try their utmost to increase *'azīma* and hardship in rejection of *rukhṣa* (130). Shāṭibī disregards these evidences on the following grounds:

1. All such reports are *al-akhbār al-aḥād* and relate only one matter. They do not constitute *al-istiqrā' al-qaṭ'ī*. Our concern is *qaṭ'iyya* not *ẓanniyya*. Hence these *ẓanniyyāt* cannot invalidate our position (130).

2. In the final analysis these traditions do not prove the intention of *mashaqqa;* rather they stress the acts themselves. The intention to bring about *mashaqqa* is a secondary (*tābi'a*) not the primary (*matbū'a*), concern. (130)

3. Rather there are traditions in which the Prophet reproached those who opted for hardship. His proscription (*nahy*) of hard-

ship (*tashdīd*) is so well known in *sharī'a* that it has become a definite principle (*al-aṣl al-qaṭ'ī*) (132-133).

4. As for *arbāb al-aḥwāl*, even in their case it is not correct to say that they intend to bring about *mashaqqa* only. Their purpose is to disregard their own *ḥuẓūẓ* (self-considerations) so as to fulfil their duties toward God. Shāṭibī explains this point more fully in the case of *ḥaraj*.

Ḥaraj is an act which causes an impediment in fulfilling the *ḥuẓūẓ*. The *arbāb al-aḥwāl* prefer to forego their *ḥuẓūẓ* in favour of their duty towards God, because of fear or of love of God (132-148). This aspect of *mashaqqa* in discussed in the next section.

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AL-MASHAQQAT AL-IDṬIRĀRIYYA

In general terms, hardship can be seen in three ways. First, there is the hardship which has become part of daily life and is no more called *mashaqqa* but is rather expressed by terms such as *kulfa, ta'b* etc. This is called by Shāṭibī *al-mashaqqat al-mu'tāda*. Second, there is the type of hardship which is not habitual. It may not be impossible to bear, but it might be so painful as to be too difficult to endure. This is called by Shāṭibī *mashaqqa ghayr mu'tād*. The third category lies on the fringes of the second one. In itself it may neither be impossible nor painful to bear, but it becomes an impediment to the performance of other acts. This is called *ḥaraj* (133).

According to Shāṭibī the first type of *mashaqqa* is not in question at all because it is, in fact, not considered *mashaqqa*. The discussion here does concern the second type when the *mukallaf* chooses it for its own sake. This type has been dealt under the category of *ikhtiyārī*. If it becomes so difficult as to be impossible to carry out, this type is discussed under the category of *ghayr maqdūr*.

What concerns the category of *idṭirārī* is, in fact, the third type of *mashaqqa*. This kind of *mashaqqa* is usually either an inevitable result of a certain act, in that case called *ḥaraj*, or it comes about from without; neither from the *mukallaf*'s own choice nor as a result of his action. This kind is discussed further below under the heading *khārijī*. The category of *idṭirārī* thus deals with *ḥaraj* actions. On *ḥaraj* actions, Shāṭibī's basic position is that they are revoked where they become impediments in fulfilling essential obligations.

According to Shāṭibī *ḥaraj* is revoked in the following two cases:

1. First where one fears being cut off from the Path (*al-khawf min al-inqiṭā' 'an al-ṭarīq*). That is, when inconvenience in performing a certain act amounts to abhorrence to it or it creates a dislike for one's obligation, that inconvenience is called *ḥaraj* and is revokable. The revoked acts include all that may cause any harm to one's body, intellect, property or general condition (136).

2. Second, where the fear of falling short of fulfilling all of one's duties occurs, or, at least, where one's indulgence in one act comes into conflict with his other duties or results in neglecting other duties. In some cases this indulgence prevents one from fulfilling one's duty to others. Thus a person stands condemned because he is required to carry out all his duties without neglecting any one of them (136).

Shāṭibī's argument in favour of the above observations are based on evidences from the Qur'ān and Ḥadīth to the effect that "God made this blessed upright *sharī'a* generous and convenient and by making it so He won people's hearts and evoked in them love for *sharī'a*. If they had to act in a way against convenience, they could not honestly fulfil their obligations" (136).

There are, however, instances from the Prophet's own actions (and from others) when people opted for the harder acts. Nevertheless the Prophet is reported frequently permitting seeking of hardship. This poses an apparent contradiction to Shāṭibī's position.

Shāṭibī resolves this problem, still maintaining his original position, by concluding on the basis of an analysis of the verses of the Qur'ān and of certain *aḥādīth* that, "The *maqṣūd* of the *Shāri'* is that the prohibition be based on some intelligible *'illa*" (138).

Shāṭibī maintains that the *'illa* of the prohibition in this case is the fatigue or impediment which results from an action and which makes it difficult or tiring to carry on the action further. In the case of the second situation, the *'illa* lies in the fact that the action impedes carrying out other duties or others' duties. The contrary is also true, if an action does not constitute an impediment in the above sense it will, not be prohibited even though it may be hard.

Shāṭibī thus concludes:

"In fine, prohibition based on some intelligible *'illa* is the *maqṣūd* of the *Shāri'*... Since this is true, the prohibition depends on there being an *'illa* both for its affirmation and its negation." (138).

There is, however, one situation of hardship worth considering. That is a situation where an obligation involves a risk of losing one's life and yet a person opts for it. Is his option valid? Shāṭibī examines this

situation by asking the following question: Did the *Shāri'* remove *mashaqqa* because it is His right (*ḥaqq*) or becaues it is the right of the *'abd?* (142). In his answer, Shāṭibī takes into consideration his previous arguments about God's not intending *mashaqqa* and observes that "when someone chooses to see the act as a right of (rather duty towards) God, the act is absolutely forbidden, (because God has removed hardship from religion). But if one regards it as a right of the *'abd*, it is not absolutely forbidden, but rather is left to one's choice." (143).

In this context Shāṭibī reconsiders the case of *arbāb al-aḥwāl* and their like, the people who choose extraordinary hardship in preference to the *shar'ī* allowances or who indulge in certain duties in order to disregard others. Shāṭibī considers the attitude of *arbāb al-aḥwāl* towards *shar'ī* obligations as extraordinary.

Shāṭibī explains his view by making a distinction between two kinds of people:

1. *Arbāb al-ḥuẓūẓ:* those for whom carrying out a particular act causes extraordinary hardship, or for whom not availing of the *shar'ī* allowance means inviting harm. Such people must not carry out an act of this kind and should avail themselves of *shar'ī rukhṣa.*

   Shāṭibī, however, warns against the other extreme of following one's *ḥuẓūẓ* absolutely so that one departs from the bondage of *'ubūdiyya* (146-147).

   "The ture position according to *sharī'a* is a combination of both aspects with a view of balance (*'adl*); to pursue one's *ḥuẓūẓ* as long as the pursuit does not interfere with an obligatory duty, and to abstain from *ḥuẓūẓ* as long as the abstinence does not lead to prohibition." (146).

2. *Ahl isqāṭ al-ḥuẓūẓ:* those for whom such acts do not bring about fatigue and hardship because of their acts being governed by fear, hope or love. The fear makes the hardship feel lesser; the hope relaxes the hardness of the act, while the love renders the act rather enjoyable. This group is so engrossed in fulfilling their duty to God on the basis of fear, hope and love that they even forget their own *ḥuẓūẓ*. They give up personal considerations (147-148).

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AL-MASHAQQAT AL-KHĀRIJA

There is a third category of *mashaqqa* which falls upon *mukallaf* from without; it is neither intended by the *mukallaf* nor is it a result of any of his actions. In the above discussed categories, *mashaqqa* was a necessary part, or a consequence, of *mukallaf's* intention or action. In the present category, *mashaqqa* is *khārijī* (external) to his intention as well as to his action.

Shāṭibī maintains that the Shāri' does not intend the continuation of a *mashaqqa* as he did not first originally intend to impose it. The only explanation for the imposition of *al-mashaqqat al-khārija* when it is known to be intended by God, is that He intends it in order to test and examine the faith of the *mukallafīn*. It is, neverethless, understood from the totality of *sharī'a* that it is permissible to remove *mashaqqa* absolutely, to eliminate the related *mashaqqa* and to protect the permissible *ḥuẓūẓ* from being affected by *mashaqqa*. The *sharī'a* even allows preventing *mashaqqa* before it occurs (150). This permission is known *a priori* (*ḍarūratan*) in *dīn* (151).

Shāṭibī illustrates *al-mashaqqat al-khārija* with the following examples: hunger, thirst, cold, heat, sickness, bodily harm, etc. Removing all of these *mashaqqa*s is allowed (150-151).

Shāṭibī, however, observes an important detail. The obligatory nature of the demand to do away with the *mashaqqa* differs in two kinds of *al-mashaqqat al-khārija*. The first is that where the obligatory nature of the removal of *mashaqqa* is proven, such as in case of an attack upon Muslims to destroy Islam. In such cases the *mashaqqa* consists of an attack or a possible domination of non-Muslims. The obligation to do away with this *mashaqqa* is undoubtedly proven.

In the second kind of *al-mashaqqat al-khārija,* for example, an incurable sickness, its elimination is not irrefutably demanded. In such a case the imposition of hardship and the endurance of trial must be borne. One must submit to such a *mashaqqa* as a *qaḍā'* (decree of destiny).

Shāṭibī sums up the discussion on *taklīf* in reference to *mashaqqa* with the following three conclusions:

1. Whether *mashaqqa* falls upon the *mukallaf* particularly and sin-
gularly (in such a case, called *al-mashaqqat al-khāṣṣa*), or falls
upon others together with him or falls upon others because of
him (called *al-mashaqqat al-ʿāmma*), in either case, a *mashaqqa* is
not required by *Shāriʿ* neither in its essence nor in the act that
leads to it.   If there be a conflict between two obligations to
eliminate two *mashaqqa*s, the elimination of a *mashaqqa* which
is *ʿāmma* (general) will prevail over the elimination of *al-mas-
haqqat al-khāṣṣa* (particular) (154-155).

2. *Mashaqqa* may be *muʿtāda* or *khārija ʿan al-muʿtād*. In case of
its being *muʿtāda*, its removal is not intended by the *Shāriʿ* just as
its imposition was also not intended.   The removal of this kind
of *mashaqqa* means the discontinuation of *taklīf*.

   In case of a *mashaqqa* which is *khārija ʿan al-muʿtād*, since it is
   conducive to disruption in either *dīn* or *dunyā*, its total removal is
   the *maqṣūd* of the *Shāriʿ*.

   There is, however, one consideration.   The hardship involved in
   acts is not the same in all cases; it varies from time to time, place
   to place and state to state.   This is the reason why the same
   mashaqqa may appear to be *khārija ʿan al-muʿtād* in certain cases
   while, in fact, it is *muʿtād*.

   Shāṭibī explains this difficulty by saying that a *mashaqqa* follow-
   ing from a single act has two ends and a middle.   The higher
   end of the *mashaqqa* is such that when something is added to it
   the *mashaqqa* ceases to be *muʿtād*.   This does not, however, ex-
   clude *mashaqqa* from being essentially *muʿtād*.   The lower end is
   such that were something subtracted, there would remain no more
   mashaqqa attributable to that act.

3. The *Sharīʿa*, according to its rqeuirements, follows precisely the
middle way in its obligations, taking both sides equally.   Obe-
dience to law comes within the capacity of man without necessita-
ting any *mashaqqa* or any leniency.

   Now if *sharīʿa* legislates in view of the *mukallaf*'s deviation from
   the middle point to one of the above-mentioned ends, the legis-
   lation will aim at returning the *mukallaf* to the just middle.   But

in this process it will lean on the other side so as to restore a
balance.

Following this line of argument, it is to be concluded that every
al-kulliyya al-sharʿiyya (universal legal principle) essentially takes
the middle position.   But if it leans toward one of the extremes, it
will do so because of actual or possible inclination towards the
other end. The tendency to *tashdīd* (severity) is brought forward
to balance the laxity in a *mukallaf*'s regard for *Dīn*. The tendency
to *takhfīf* (laxity) is brought forward to balance hardship and
severity.

The departures from the middle position, as reported in traditions,
must be understood in the light of the above explanation.   This
departure is meant to balance the severity or laxity, whichever
the case may be, inherent in the act which is the object of
obligation.   Similarly the stress on piety (*waraʿ*) and asceticism
and the like, when they appear to be departures from the middle
position, should also be taken as an attempt to balance the
laxity in obligation.

NOTE

1. The number in the parenthesis in the text in this chapter refer to the pages of
al-Muwāfaqāt, vol. II (Cairo: Muṣṭafā Muḥammad. n.d.)

OBEDIENCE

Shāṭibī develops a distinction between moral and legal obligations with reference to an analysis of the purpose of the Lawgiver in making the *mukallaf* subject to the rules of *sharī'a*. For this analysis he proceeds to define the term *ta'abbud* (obedience).

The confusion of legal with moral obligations arose especially under the impact of ṣūfīs who maintained *maṣlaḥa* to mean seeking personal ends or interests (*akhdh al-ḥuẓūẓ*) and hence opposed to *ta'abbud* (obedience).[1] According to to them, therefore, *ta'abbud*, meant abondoning of *ḥuẓūẓ*. This view had serious implications for the definition of legal obligation. Shāṭibī, therefore, sets out to clarify and analyse the terms of *ta'abbud* and *ḥuẓūẓ* in reference to obligation.

As elaborated earlier, the notions of *zuhd* and *ikhlāṣ*, as expounded by ṣūfīs laid special stress on *tark ḥuẓūẓ al-nafs* as a necessary qualification of *'ubūdiyya* (the ṣūfī understanding of obligation). Shāṭibī maintains that although legal obligation also aims at *ta'abbud* (obedience) yet the *ḥuẓūẓ* are not denied by the notion of *ta'abbud*. It is in fact the conformity of action with the intent of the Lawgiver which constitutes *ta'abbud*. The ṣūfī sense of *ta'abbud* is further refuted by the limitation of the scope of *ta'abbud* in the sense of mere obedience. For Shāṭibī, this sense applies only to the *'ibādāt*, while *'ādāt* are governed by *maṣlaḥa*. Since according to him, in the final analysis, the *ta'abbud* in *'ibādāt* is only one aspect of *maṣlaḥa*, and *maṣlaḥa* in *'ādāt* is not

opposed to *ta'abbud*, Shāṭibī concludes that legal obligation is motivated by the *maslaḥa* of the *mukallaf*.

Thediscussion of this aspect is arranged by Shāṭibī in twenty problems. The three main topics discussed are as follows: 1) *ta'abbud* and the problem of *ḥuẓūẓ;* 2) *'awā'id;* and 3) the division of obligations into *'ibādāt* and *'ādāt* in accordance with the considerations of *ta'abbud* and *maslaḥa*.

TA'ABBUD AND THE ḤUẒŪẒ

Shāṭibī opens the discussion by saying that "the legal objective in instituting the law is to relieve the *mukallaf* from the dictates of his passions (*hawā*) so that he be a servant of God voluntarily (*ikhtiyāran*) as he is so naturally (*iḍṭirāran*, by compulsion)" (168).[2]

To prove this point he argues from the *Qur'ān* and the sayings of the Prophet where following one's passions (*hawā*) is condemned (169). He further contends that human experience in society (*al-tajārib wa'l-'ādāt*) also tells us that the *maṣāliḥ*, be they those concerning religious matters or be they mundane, cannot be achieved by following the passions and selfish motives (170).

The above position may appear to deny the interests of the people, and may imply a demand for absolute obligation. Shāṭibī makes, here, a significant distinction. He refutes the identification of *maṣāliḥ* with *shahawāt* (desires), *hawā* (passion) and *aghrāḍ* (personal interests). He stresses that *sharī'a* aims at the *maṣāliḥ*, and not at realizing *hawā*. He does not accept the idea that *'akhdh al-ḥuẓūẓ* can be equated with *hawā* (172). In order to distinguish between *hawā* and *ḥuẓūẓ*, Shāṭibī argues in detail that following the passions is condemned even in cases where the act concerned is in itself praiseworthy, but this is not so insofar as *ḥuẓūẓ* are concerned (174). The reason is that an action performed in obedience to the stimulus of passion, obviously, pays no attention to the command or prohibition of the law, whereas seeking fulfilment of the *ḥuẓūẓ* and *aghrāḍ* is not opposed to the objectives of *sharī'a* in the above sense (172, 174). One can seek *ḥuẓūẓ* by making them subservient to the *maṣāliḥ* which are the purpose of law. Referring to the ṣūfīs' states and experiences, Shāṭibī argues that by denying *ḥuẓūẓ al-nafs* these people aim at something praiseworthy; but by suspending the observance of the legal obligations or by aiming at things which may bring happiness to them, they are merely obeying the demands of passions (175).

On the contrary, Shāṭibī argues that one cannot avoid *ḥuẓūẓ* in fulfilling legal obligations. He says furthermore that *ikhlāṣ* or more specifically *takhlīṣ al-ḥaẓẓ* (purification of *ḥaẓẓ*) does not mean denial of *ḥuẓūẓ*.

The main points of Shāṭibī's arguments are as follows:

1. From the standpoint of *ḥaẓẓ*, the *maqāṣid* may be divided into two types: *al-maqāṣid al-aṣliyya* (essential objectives) in which the *mukallaf* has no *ḥaẓẓ*, and *al-maqāṣid al-tābi'a* in which the *ḥaẓẓ* is provided. *Al-maqāṣid al-aṣliyya* mean universal necessary obligations consisting of the Five *Maṣāliḥ* (176). Examples of *tābi'a* are obligations in which the natural desires (*shahawāt*) and pleasures are also aimed to be satiated (178). Shāṭibī argues that in *al-maqāṣid al-tābi'a*, the *shahawāt* are, in fact, a means to achieve *al-maqāṣid al-aṣliyya* and, thus, they no longer remain *ittibā' al-hawā*. In fact, God knows that *dīn* and *dunyā* are maintained and well preserved by these stimulii in man which excite him to acquire what he and his fellow beings need. The desires to eat and drink are created so that when he is hungry and thirsty, they motivate him to seek means to fulfil this need. But there are certain desires which one individual cannot fulfil alone; hence he needs the co-operation of others. Thus, although each one fulfils his own desires, in fact, at the same time, he is also working for the benefit of others. Hence his seeking of *ḥuẓūẓ* is, in a sense not entirely a *hawā*. On the basis of this consideration seeking of the *ḥuẓūẓ* is made permissible, not prohibited (178-179).

2. Through a detailed analysis of *al-maqāṣid al-aṣliyya* and *al-tābi'a*, Shāṭibī demonstrates that in obligations where the *ḥaẓẓ* of the *mukallaf* is not the primary goal (*bi'l qaṣd al-awwal*) it is realized indirectly (*bi'l qaṣd al-thānī*)[3]. He shows also that where the *ḥaẓẓ* is the primary goal, the act is naturally relieved of *ḥaẓẓ*, because to seek *ḥaẓẓ* in this case becomes part of the obligation (183-186).

3. *Takhlīṣ* (purification) or *tajrīd* (abstraction) from *ḥaẓẓ* is thus achieved in those cases where *ḥaẓẓ* is permitted or demanded even when one is actually seeking *ḥuẓūẓ*. This occurs for the reason that if the seeking of *ḥaẓẓ* is qualified by legal provisions and other such conditions, there is, in fact, no more *ḥaẓẓ* for *mukallaf* insofar as the *ḥaẓẓ* is a requirement (186).

4. The legal penalties in which there apparently figures no *ḥaẓẓ* for the *mukallaf*, are, in fact, a means to protect or realize the *ḥaẓẓ* of the *mukallaf*. The penalties are meant to prevent persons

from harming others' *maṣlaḥa* so that the *maṣaliḥ* in general are maintained in a better way (190-191).

Shāṭibī maintains that in fulfilling an obligation an act would thus accord either with *al-maqāṣid al-aṣliyya* or with *al-maqāṣid al-tābi'a*. If it conforms with *al-maqāṣid al-aṣliyya*, its validity cannot be questioned, no matter whether it be free from *ḥaẓẓ* or provides for *ḥaẓẓ*. In other words the criterion is the seeking of the *maqāṣid* not *tark ḥuẓūẓ* (196). This conclusion sheds a new light on the notion of *ikhlāṣ* (sincerity, purification). Contrary to the usual definition of *ikhlāṣ*, which insisted on negation of *ḥuẓūẓ* to be *ikhlāṣ*, Shāṭibī concluded that it is conformity with *al-maqāṣid al-aṣliyya* which draws an act closer to *ikhlāṣ al-'amal*, and the act then becomes an act of *'ibāda*, whether it was originally *'āda* or *'ibāda* (202).

In cases where the act accords with *al-maqāṣid al-tābi'a*, the case is somewhat different. Here the criterion cannot be the *tābi'a*, hence it must be seen whether the act is connected with *al-maqāṣid al-aṣliyya*. If it is so connected, even though it seeks *ḥaẓẓ al-nafs*, the act is undoubtedly one of obedience (207). This connection is either actual such as a declaration of intention by the *mukallaf*, or potential such as acts which are means to the permitted act. If this connection with *aṣliyya* is absent, then the act is simply one of *ḥaẓẓ* and *hawā* (207).

Shāṭibī explains the matter further by saying that if the seeking of *ḥuẓūẓ* were the absolute opposite to obedience, it would not have been permissible for anyone to perform any act of *'āda* unless there were no intention and effort to achieve the *ḥaẓẓ al-nafs*. In fact there is no such command in *sharī'a*, nor is the goal of *ḥuẓūẓ* in *al-a'māl al-'ādiyya* prohibited, even though the Lawgiver always lays stress on *ikhlāṣ* (208).

If the intention to achieve *ḥaẓẓ* is denied in *al-a'māl al-'ādiyya*, any hope for paradise or fear of hell in reference to acts of *'ibādāt* would render them invalid (*'amal bighayr al-ḥaqq*). Such a conclusion is obviously absurd in view of the numerous verses in the Qur'ān and of the sayings of the Prophet which promise reward and punishment for such acts. To act in hope of reward or with a fear of punishment is certainly an act of seeking *ḥuẓūẓ* (210).

To defend his conclusion, Shāṭibī, in addition to rational and traditional criticism, particularly mentions Ghazālī's views on *ḥuẓūẓ* and clarifies his own position by criticizing Ghazālī (214-215). Shāṭibī explains that

obligations are divided into two categories. First, there are the *'Ibādāt*, by which one seeks closeness to God. They consist of Belief (*'īmān*) and all prescribed rituals as fundamentals of Islam. The second category are *'ādāt*. Satisfaction of *'ādāt* obligations means providing *maṣāliḥ* absolutely and opposition to meeting these obligations means creating *mafāsid*. The second kind of obligation belongs to this world and aims at the *maṣāliḥ* of the people. The first has to do with the rights of God in this world. It does not aim to yield *maṣāliḥ* in this world but rather in the hereafter (215).

Now in the first category the *ḥaẓẓ* in the hereafter is established and lawful. The seeking of *ḥaẓẓ* in this sense cannot be called *shirk* (polytheism), nor is it a denial of *ikhlāṣ*. Furthermore, even according to Ghazālī, the highest aim of *'ubūdiyya* is *naẓar ilā al-maḥbūb* (the vision of the beloved) in the *ākhira*, which is also a *ḥaẓẓ* (216). In fact Ghazālī calls it *al-ḥaẓẓ al-'aẓīm* (greatest share/interest/joy). Also to demand complete negation of *ḥuẓūẓ* is an impossible obligation (216). Seeking the *ḥaẓẓ* in this world in *'ibādāt* such as to perform *'ibādāt* in order to earn the praise of the people, or for some strictly personal considerations like fasting in order to save money, etc., are matters which affect the *ikhlāṣ* of *'ibādāt* (218-219).

As to the second category of obligations, i.e. the *'ādāt* such as *nikāḥ* (marriage), *bay'* (sale), etc., it is well known that the lawgiver intends through these things the maintenance of the immediate *maṣāliḥ* of the people. Since such is the case, seeking the *ḥaẓẓ* in performing this category of obligations cannot be contradictory to the intention of the lawgiver. Further, if it were wrong to seek these *ḥuẓūẓ*, the Qur'ān and *Sunna* would not have mentioned them as being part of God's Grace and favour (222).

The distinction in *'ādāt* and *'ibādāt* may be observed from the point of view of *niyāba* (proxy) as well. *Niyāba* is not allowed in *'ibādāt*, while it is lawful in *'ādāt* with the few exceptions where the obligation is specific and individual. The criterion in this regard is the consideration whether the *ḥaẓẓ* which one aims at can be realized by someone else for him or not. If this obligation can be realized by another person then *niyāba* is valid; otherwise, not. For instance, in matters of sale etc. *niyāba* is valid, but it is not so in matters such as eating, drinking, marrying, etc (227).

Since *ḥaẓẓ* is distinguished from *hawā*, Shāṭibī enumerates three characteristics of the obligation which provide assurance that the effort

to achieve *ḥaẓẓ* in obedience to the lawgiver will not reduce one's act to *hawā*. These characteristics are *dawām* (perseverance) (242), universality (*kulliya*) and the generality (*'umūm*) of the obligation.

It is a test of one's obedience when one has to carry out an obligation constantly (243). The characteristic of *kullī* (universal) requires that all obligations, and each obligation in its entirety, must be met without there being any possibility of getting exemption from some, or part of an, obligation. All particulars and parts of an obligation are obligatory without preference of one above the others (244). Being *'āmm*, the obligations are obligatory upon each *mukallaf* without distinction. The only exception to this *'umūm* is the Prophet, in respect to his regular obligations as well as to his special distinctive privileges (*mazāyā*). This case is unique, partly because *khawāriq al-'ādāt* (deviation from regular habits) are often equal to *'ādāt* in the case of the prophets. Since as a general rule the acts of the Prophet are obligatory, as models to be followed, and the cases of *khawāriq al-'ādāt* are impossible to be followed, the latter must be considered as special to the Prophets. They are not obligatory to be followed unless the *sharī'a* explicitly demands so and then only if they do not disagree with the *sharī'a* (249-266). The main argument that underlies this discussion is that the extraordinary acts of the Prophet where he appears to be abandoning *ḥuẓūẓ* are in fact *khawāriq al-'ādāt* in the case of common man (269). Since *sharī'a* is universal, it cannot oblige all men with things which are *khawāriq* (275). Invalidity of the *khawāriq*, however, does not mean that law does not or cannot be changed. What Shāṭibī is stressing is the fact that the *khawāriq* do not convey the sense of legal change; they are rather exceptions to laws of nature. In addition to Prophetic revelation, Shāṭibī includes *kashf* (mystic revelation) and *ru'yā* (dreams) of the *awliyā'* in *khawāriq* (266-269). In order that it may be understood fully, this discussion requires a rather detailed analysis of the notions of *'ādāt* and *khawāriq*, and their relationship to the rules of *sharī'a*. The fuller analysis of *'āda* is presented in a subsequent chapter, as it is more suited to the discussion there. Briefly, Shāṭibī uses *'ādāt* both in the sense of habits, customs and human behaviour and as an opposite term to *'ibādāt*. Essentially, *'āda* belongs to the physical world. *'Ādāt* are constant; and when some event happens contrary to *'āda* it is called *kharq al-'āda*. Not all of the *'ādāt* are constant, however; it is, in fact, only the universals of being which are constant; Shāṭibī calls them *al-'awā'id al-mustamirra*. Some of these *'awā'id* are either introduced or sanctioned by *sharī'a*, hence called

al-'awā'id al-shar'iyya. Others are current in the practice of the people, hence called *al-'awā'id al-jāriya*. *Sharī'a* does not oppose *al-'awā'id al-jāriya*; in fact, it shows a constant regard for them. There are, however, variations in the practice of these *'ādāt*. Also, they change with time and place.

A detailed analysis of *al-'awā'id al-shar'iyya* by Shāṭibī reveals that *maslaha* is the basic consideration both in the change and the continuity of these *'awā'id*. In the light of this view it may be seen that *ta'abbud* toward *al-'awā'id al-shar'iyya* is not devoid of *huzūz* and *maslaha*.

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TA'ABBUD AND MAṢLAḤA

From the above analysis Shāṭibī concludes that the essential consideration in *'ibādāt*, insofar as the *mukallaf* is concerned is *ta'abbud* without regard for *ma'ānī* (inner meanings). In *'ādāt*, on the other hand, the essential consideration is that of *ma'ānī* (300). This conclusion is further demonstrated by the following points of argument. First, from a survey of *sharī'ā* it may be inductively known that provisions such as *ṭahāra* (ritual cleanliness) and *tayammum* (ablution with dust) in the realm of the *'ibādāt* are difficult to explain, except in terms of *ta'abbud* (301). In the realm of *'ādāt*, it is obvious that such provisions are based on the *maslaha* of the people. It is thus inductively discoverable that the Lawgiver relies on a regard for *maslaha* in *'ādāt* (305).

Secondly, in *'ibādāt* the extension of the scope of *ta'abbud* is not intended (301). In other words, the obligation is limited to the specific commands comprised in the *'ibādāt*. This is why no explicit reason is given for promulgating such commands. In the case of *'ādāt*, on the contrary, the extension of the rules is the purpose. Hence the lawgiver generously explains the rules of law relating to *'ādāt* in respect to their *'ilal* (reasons) and *hikam* (wisdom) (306).

Ta'abbud and *ma'nā/maslaha*, however, are not opposite terms for Shāṭibī. He characterizes *ta'abbud* by various statements: "*al-rujū' ilā mujarrad mā haddahu al-Shāri'* " (recourse only to what the lawgiver has determined) (304); "*al-inqiyād li 'awāmir Allāh*" (being bound by the commands of God) (301); "*mā huwa haqqun lillāh khāṣṣatan*" (that which is the exclusive right of God) (315); "*rāji'un ilā 'adami ma'qūliyat al-ma'nā* (that which refers to the nonintelligibility of its reason) (318). Shāṭibī defines *ma'nā* in this context as follows: that is "*dabṭu wujūh al-maṣāliḥ*" (to define the scope of *maṣāliḥ*) (308).

The distinction between *ta'abbud* and *ma'nā* or *maslaha* occurs initially in reference to the question whether the reason for a command is intelligible or not. If the reason is intelligible, the command is based on *ma'nā*: otherwise, it is *ta'abbud* (314). This explanation is as yet insufficient, however, because the "intelligibility" needs further to be qualified.

Shāṭibī explains that "intelligibility" obtains where the *ma'nā* or *maṣlaḥa* can be extended as an *'illa* to other similar cases. To illustate,

> We know that the required conditions in marriage such as that of the guardian and the dowry, etc., are laid down to distinguish marriage from fornication (*sifāḥ*)... But (if they are considered as being the *'illa* of marriage) they are but general principles just as humility and submission to the Sublime are the reasons for the obligation of *'ibādāt*. This amount (of *'illa*) is not sufficient to establish an analogy, to extend the above rule to further cases; so that one might say that were a distinction between marriage and fornication to be established by some other factors, the above conditions would no more be required.(308)

This explanation implies at least two things; one, that *ta'abbudāt* according to Shāṭibī, are absolute obligations in the sense that they must be fulfilled without asking for the reason, and second, that *ta'abbudāt* cannot be made the basis of analogy. Shāṭibī seems to be stressing the second implication, rather than the first. In other words, he is implicitly arguing that the absoluteness of obligation in matters of *ta'abbudāt* is maintained only in the sense that they are not to be extended. There is no denial of *'illa*; in fact it is only after the search for an *'illa* in the command that one can decide whether the *'illa* given or implied is general or specific. What is denied is the extension by *ta'līl* and *qiyās*. The denial of *ta'līl* amounts to placing a limitation on the scope of the application of these commands. It is in the sense of specifically limited command that *ta'abbud* is spoken about in this context. As Shāṭibī himself says, "In all those matters where a consideration of *ta'abbud* is established, there can be no *tafrī'* (deduction, extension by analogy) from them"(310).

Shāṭibī, however, also accepts that even matters, where the consideration of meaning without *ta'abbud* (in the sense mentioned above) is established, are not free from *ta'abbud* (in the general sense of the term) (315). This general sense of *ta'abbud* is demonstrated by the following considerations. First a *mukallaf* is bound to obey a command because of the sense of demand (*iqtiḍā'*) and option (*takhyīr*) imposed by the command, not because he finds in it a certain *maṣlaḥa* (311). Second, even if a decision about an *'illa* is taken, this process does not assure us that the *'illa* decided upon is the only *'illa* of that command or that it is the only *maṣlaḥa* to be realized. This state of indecisiveness (*wāqifīn*) is removed by recourse to *ta'abbud* (312). Shāṭibī further explains that *qiyās* means a search for an *'illa* only insofar as it is ordinarily possible.

Qiyās does not exhaust all the *'ilal*; it is rather based on the most probable (*ghalbat al-ẓann*) *'illa*. On this basis *'qaḍā' bi'l ta'addī'* (judicial decision by extension of the original ruling) is not contrary to *ta'abbud* which, here, means 'not based on reason' (312).

The legal obligations are known to us in two ways: either through well-known methods such as *ijmā'*, *naṣṣ*, *ishāra*, *munāsaba* etc., or through instances where none of these methods can be applied. The obligations of the latter kind are known only by *waḥy* (revelation). In this category of obligation the absence of *'illa* and *ta'addī* within command demands *ta'abbud* only. This *ta'abbud* means to stop at the point where the *Shāri'* has defined the limit; if the *'illa* is not given, *ta'abbud* demands that the command must not be extended by *qiyās* (313). "A *maṣlaḥa* is so from God in such a manner that it is verifiable (*yaṣdiqu*) by human reason (*'aql*) and reassuring (*taṭma'inn*) to the soul (*nafs*)" (315).

The *takālif* can also be viewed as rights of God. In this sense they become *ta'abbudī*. Shāṭibī, however, regards *ta'abbud* as a general sense of the rights of God. He divides these rights into three categories. First are those rights which belong exclusively to God, such as the *'ibādāt*. Second, are those rights of God which involve the rights of men as well, but the consideration of the former dominates. The third category consists of those rights of God in which consideration for the rights of men dominates. It is to the last category that *maṣlaḥa* or *ma'nā* belong directly, and hence this category is not essentially *ta'abbudī* (318-320).

Shāṭibī further clarifies the distinction between *ta'abbud* and *maṣlaḥa*, and *'ibādāt* and *'ādāt* from the point of view of *ḥuqūq* (rights). He says that the right of God means a situation "where it is understood from *shar'* (law) that the *mukallaf* has no option (*khiyara*), whether the *ma'nā* is intelligible or not" (318). The right of man is defined as "what refers to his (man's) *maṣāliḥ* in this world" (318). The *maṣāliḥ* in the hereafter are generally rights of God. Thus *ta'abbud* means something "the meaning of which cannot be specifically understood" (318). In view of these definitions Shāṭibī concludes that *'ibādāt* essentially refer to the rights of God and *'ādāt* to the rights of men (318).

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NOTES

1. For details on this point see above pp. 161 - 63. Also see pp. 58 ff.

2. The numbers in the parenthesis in the text of this chapter refer to the pages of *al-Muwāfaqāt*, Vol. II (Cairo: Muṣṭafā Muḥammad, n.d.)

3. Kwame Gyekey ["The Terms 'Prima Intentio' and 'Secund Intentio' in Arabic Logic", *Speculum*, XLVI (1947), I, 32 - 38] also suggests that the term *'alā al-qaṣd al-awwal* should be translated as 'primarily', or 'directly' instead of 'in the first intention.'

CHAPTER THIRTEEN

VOLITION

So far the discussion has been concerned with the objectives of the Lawgiver. The present chapter discusses the objectives of the *mukallaf*. On the whole these objectives have to do with the intention of the *mukallaf* and its effect on the validity or utility of the act. The discussion is arranged by Shāṭibī in twelve problems. At the end is an epilogue on the problem of knowing the objectives of the Lawgiver.

The main points for discussion are the following terms: *niyya* (intention) *maqāṣid, takālif,* and *jalb al-maṣāliḥ* (to seek *maṣlaḥa*); and *maṣlaḥa* and *taḥayyul* (seeking legal devices to escape the severity of the law).

Shāṭibī opens the discussion by saying that "acts are (judged) by *niyyāt* (intentions)" (323).[1] Thus an interrelation between 'act' and 'intention' is established. But this raises a question about the details of this relationship. Does it mean that intention without an act and an act without intention will not be counted? Further, what is intention? By intention of the *mukallaf* does one mean the correspondence with the intention of the lawgiver in that particular act or something else? It may be noted here that Shāṭibī uses the terms *niyya, qaṣd, maqṣid, ibtighā* interchangeably, all of which have the sense of the English word "intention".

To define the relationship between *niyya* and act Shāṭibī says that the *maqāṣid* mark the distinction between *'āda* and *'ibāda*. The same act, such as the act of prostration, is *'ibāda* according to one intention, but it is no more

'*ibāda* according to the other (324).   Thus acts are judged by the intention
of their authors.   Shāṭibī, however, maintains a distinction at this point
between *al-aḥkām al-waḍ'iyya* and *al-aḥkām al-taklīfiyya*. *Al-taklīfiyya* are
those rules of law which come into effect by the declaration of the lawgiver.
They are declared to be *'amr* (command), or *nahy* (prohibition), etc.   The
five well-known values of obligatory, recommended, etc.,[2] belong to this
category of rules.   Since *al-aḥkām al-taklīfiyya* produce direct obligations,
a necessary condition for their being fulfilled is the intention of the *mukallaf*
to do so.   *Al-aḥkām al-waḍ'iyya* are those rules which are not the effect of
a direct command but which become effective because they are auxiliary
to direct commands.

With the above distinction in mind, Shāṭibī says that if an act
is connected with a *qaṣd*, *al-aḥkām al-taklīfiyya* become effective in
connection with this act.   If the act is performed without a definite
intention, *al-aḥkām taklīfiyya* will not be effective.

One possible objection to this position may be drawn from the cases
of acts done under *ikrāh* (duress) and *hazl* (joke) where the intention of the
mukallaf is not connected with the acts in question, yet, juridically the acts
are considered to be valid (325).   Shāṭibī's answer to this objection entails
very significant points of philosophical interest.   In brief, he seems to be
maintaining a distinction between two standpoints of deciding the validity
of an act; from the standpoint of rligion and morality the act is subject to
al-aḥkām al-taklīfiyya and here the intention must correspond explicitly
with the act, otherwise, the act is not valid. From the juridical standpoint,
in cases other than *'ibādāt*, expression of intention and its correspondence
with the said act is not a necessary requirement; an act is valid and sub-
ject to juridical consequences even in the absence of a corresponding
niyya.

The source of confusion has been the question of consideration of
niyya in the above cases of duress and joke.   The *niyya*, here, is not lack-
ing in an absolute sense.   Shāṭibī, therefore, begins his answer by explaining
various senses of the considerations of *niyya*.   In its general sense, *niyya*
(in the sense of volition) is a necessity (*ḍarūra*) for the validity of an
action.   This is so because the doer of an action insofar as he is *mukhtār*
(one who has a choice, freedom of will), necessarily has an implicit intention
in his action, whether his intention is to obey the command of the
lawgiver or not.   From this standpoint intention is absent only in such

cases as, for instance, when a certain action is performed by a *nā'im* (a
person in sleep) or by a *majnūn* (an insane person).   Having no *ikhtiyār*,
individuals in these states, are not *mukallafīn*.   Those acts which are
done with *ikhtiyār*, however, connot be considered as lacking *niyya*.   Hence
acts performed under duress or as joke will be judged, juridically, by such
intentions.   This sense of the consideration of *niyya* is from the standpoint
of *al-aḥkām al-waḍ'iyya*.   As has been explained earlier, from the stand-
point of *al-waḍ'iyya,* an act becomes valid and its juridical consequences are
effective if the necessary conditions of the said acts are fulfilled, even
though a corresponding *niyya* be absent in that act.   For instance, if a
person returns a deposit to its owner, even though unwillingly, juri-
dically his act of returning the deposit is valid and effective (327).

Unlike the above-mentioned general sense of the consideration of
niyya, the consideration in the special sense demands the intention to obey
law.   In this specific sense the consideration of *niyya* becomes a necessary
condition for the validity of an act in cases of *'ibādāt*.   It is also necessary
when one wants to transform all his acts, *'ibādāt* or *'ādāt,* into *ta'abbudāt*.
Free actions (*al-a'māl al-dākhila taḥt al-ikhtiyār*) can be changed into
ta'abbudī, if the intention of obedience accompanies them.   This sense
of consideration of *niyya* is from the standpoint of *al-aḥkām al-taklīfiyya*.
As discussed earlier, from the standpoint of *al-taklīfiyya* an act becomes
valid and the *jazā'* becomes effective only if the act is accompanied by
the intention to obey the *Shāri'*.

The *niyya* of obedience is understood as meaning that the intention
of the *mukallaf* performing an act will be in conformity with the intention
of the lawgiver in instituting the law, i.e. with the *maṣlaḥa* of the people
(331).   From this standpoint any act by which one intends for what is unla-
wful, becomes void (*bāṭil*).   The reason for this judgment is that things are
allowed in order to achieve *maṣlaḥa* and remove *mafsada*.   A contrary
intention with respect to these lawful things would be equivalent to seek-
ing *mafsada* and preventing *maṣlaḥa* which is opposed to human interest
as well as to *sharī'a* (333).

In the light of above discussions, acts may be of the following four
types.   First there are those acts in which the act and the intention both
conform with the objectives of the lawgiver.   Second, there are those acts
in which both do not conform.   Third there are those in which the act

conforms, but the intention does not. Fourth there are those in which the intention conforms, but the act does not (337).

The legal value of the act in the first and second type is obvious. In the third type the doer will be considered disobedient only for his intention but not for his act. In orther words, he has violated the right of God, not the right of men (338). If a man knows, however, that his act conforms to the objectives of the lawgiver, although his intentions do not, then he is to be the more blamed because he is taking advantage of his act for some other objectives (339).

In the fourth type, if the doer of the act knows that his act is contrary to the objectives of the lawgiver then his conduct is similar to *ibtidā'* (*bid'a*, innovation in a religious matter). *Bid'a* as such is *madhmūm* according to Shāṭibī. He does not accept the judgment of *bid'a* made by some scholars. What is called *al-bid'a al-muḥarrama* or *al-bid'a al-madhmūma* is understood by Shāṭibī in reference to the second type of acts where intention and act both are contrary to the objectives of the lawgiver (340). In *bid'a per se* the intention conforms but the act does not. Shāṭibī, however, excludes those cases where the doer does not know that his act does not conform. In such a case he will not be regarded as disobedient, but his act will still not be considered as compliance (*imtithāl*) (342).

JALB AL-MAṢLAḤA

As mentioned above the *jalb* (seeking for) *al-maṣlaḥa* within the limits of *sharī'a* becomes a necessary requirement of *niyya*. The act of seeking *maṣlaḥa* occurs, however, not always in isolation; often it is connected with other acts as well. Hence the questions that need be considered in regard to *jalb al-maṣlaḥa* have to do with the following situations: striving for *maṣlaḥa* when the result will be harmful to others, and secondly, striving for *maṣlaḥa* of someone else (348).

Shāṭibī divides the situations where one's own *maṣlaḥa* may be harmful to others into eight types of cases, according to the types of harm done. Harm may be general to the whole community, or may be specific to someone; it may be inevitable; it may be avoidable, etc. (349-362). The main principle upheld in these discussions is that if there is an alternative to harm, the bad result must be avoided. Disregarding an alternative would mean that harm becomes the only purpose of one's action (349). Furthermore, striving for *maṣlaḥa* even though it may be harmful to others will be allowed if there is *maṣlaḥa* for more people than are harmed. The right of striving for *maṣlaḥa* will be given preference to the consideration of avoiding harm if it is well known that a prohibition to strive for *maṣlaḥa* will cause harm to the seeker. In cases where the seeker himself does not meet any harm but engages in efforts to achieve *maṣlaḥa* that customarily lead to harm, it must be seen whether this potential harm is *qaṭ'ī* (definite), *nādir* (rare) or *ẓannī* (probable). A man will be prevented from striving for *maṣlaḥa* only if the harm done to others is *qaṭ'ī* (348).

The second question in regard to *jalb al-maṣlaḥa* is that of seeking the *maṣlaḥa* of others. As a general rule Shāṭibī states that if someone is obliged to seek his *maṣāliḥ*, it is not obligatory for others also to seek his *maṣāliḥ* (364). This rule is similar to the rule of *niyāba* discussed earlier[3]. The main points that Shāṭibī brings forth in this discussion serve to show that no man is under obligation to fulfil the specific obligations of others. We are not concerned here with the obligations of *'ibādāt*, as was made clear earlier in reference to *niyāba* in that *'ibādāt* cannot be fulfilled by proxy. The obligations under discussion are those that concern this world. Such obligations, however,

become binding upon others when the original *mukallaf* is unable to fulfil them, although they are necessities for him. For instance, the following obligations which aim at striving for the *maṣāliḥ* of others, can be justified in terms of the above explanation: *zakāt,* lending money, burying the dead body, looking after the affairs of minors and the insane, etc. Among these obligations are some which are general (or public) (*kifā'iyya*) and some which are specific (*'alā al-ta'yīn*) and individual obligations. The specific obligation cannot be fulfilled by proxy. In such cases an individual is required to seek *maṣāliḥ* of others, b ut only if his own *maṣāliḥ* are not affected. A situation meeting this condition is possible if either the individual is capable of fulfilling his own as well as others' obligations, or if other people are looking after his *maṣāliḥ*. If he cannot fulfil both his and others' obligations at the same time, his obligation to others will give way in instances of particular obligations to a particular person. His own *maṣlaḥa* is to be preferred to others'. If the matter at issue is a general obligation to others, then others must look after that individual's obligations while he fulfills his duty (364-368).

Shāṭibī's conclusions regarding the above two questions of striving for *maṣlaḥa* are very significant to his legal philosophy. He seems to admit that by doing good, or trying to do good, i.e. to strive for one's *maṣlaḥa*, one may also actually do evil, i.e. to harm others. This would make the *sharī'a* in some instances result in evil deeds. To rectify such a consequence, Shāṭibī stresses that obligations be undertaken after considering their ends and consequences, and not on their appearance of good-or badness. Furthermore, the goodness of obligations, or the ultimate criterion of *maṣlaḥa,* is good of the larger number of people and harm to less of them. If the good of the few is harmful to many, it no longer remains good.

The above conclusion shows that in Shāṭibī's legal thinking there are certain elements which imply law's definition in terms of consideration for society as a whole too strongly to allow a legal obligation to be defined as than an individual's commitment towards the lawgiver. In fact, Shāṭibī even implies that by disregarding the social implications of a legal obligation, one's individual commitment to do good may result in evil.

Shāṭibī's view of legal obligation as also a social obligation is further explicated in his conclusions regarding the situation where one strives for the *maṣlaḥa* of others. If a person has devoted himself to look after the

maṣāliḥ of society it becomes a kind of societal obligation for others to look after the *maṣāliḥ* of that individual. Shāṭibī states that this is why the obligation to pay *zakāt* is prescribed, mutual lending of money is allowed, and looking after the maintenance of wife and children is required. In all the above cases the individuals in question, e.g. the poor in case of *zakāt,* and wife and children, are unable to look after their own *maṣāliḥ,* either because they are occupied wih serving the *maṣāliḥ* of others, as in case of wife, or they are simply incapable of doing so.

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TAHAYYUL

Shāṭibī defines *ḥīla* and *taḥayyul* as follows:

"When a *mukallaf* uses certain means in order to escape an obligation or to make some forbidden thing permissible for him, this use of means which causes an obligatory thing to become apparently non-obligatory and a forbidden thing apparently to become permissible, is called *ḥīla* or *taḥayyul*" (379).

These means are either apparently permitted in *sharī'a*, or are not permitted. They work either by rendering a rule inapplicable or by transferring the consideration of the matter at issue to some other act (378).

Taḥayyul, according to Shāṭibī, works on two premises:

1) It strives to transfer the value of one legal act to another legal act externally, i.e. merely on the basis of apparent similarity between the two acts.

2) It disregards the inner meaning (i.e. *maṣlaḥa*), of the acts on the basis of which the acts were originally intended by the *shāri'*, and by doing so reduces the value of these acts to be means to certain other acts, whereas they were meant to be the end.

Shāṭibī illustrates it with the following example: Someone wishes to sell ten dirhams in cash for twenty on credit. Because of the prohibition of usury, such a transaction is not allowed. This person evades this prohibition by the following *ḥīla*. He buys a piece of cloth for ten dirhams and sells it for twenty on credit. To refer to the above premises, he transferred the value of the act of selling the cloth (which is permitted) to the selling of dirhams (which is prohibited) only on the basis of their external similarity (both are acts of selling). But he disregarded the *maṣlaḥa* in both acts; he rather used the *maṣlaḥa* of one act, i.e. to earn profit in selling cloth, as means to achieve his own end.

In the light of the above explanation Shāṭibī regards *taḥayyul* as unlawful on the whole (380). He supports his argument from the Qur'ān and Ḥadīth. He contends that rules of law are made for the *maṣāliḥ* of the people; hence acts will be judged according to their relation to *maṣāliḥ*

because that is the objective of the lawgiver. If an act is based externally and internally on lawful grounds, it is evidently a valid act. On the other hand, if it is externally lawful but the intention of that act is repugnant to a legal principle it is not lawful (385).

Shāṭibī stresses that legal acts are not intended (*maqṣūda*) for their own sake, but for their *ma'ānī* which are the *maṣāliḥ*. The *maṣāliḥ* in *'ibādāt* are closeness to God, devotion to Him alone with submission and humility and conformation of the heart and other parts of body in obedience to Him. If these *maṣāliḥ* are not sought, even the *'ibādāt* become unlawful. There is a clear instance in the case of *ṣalāt* done for the sake of *ri'ā al-nās* (to put up a show for the people). Such *ṣalāt* is not valid (385).

In view of the above explanation *ḥiyal* (p. *ḥīla*) are of three types. First come the *ḥiyal* of the hypocrites which are unanimously regarded as void and illegal (387). Second are those *ḥiyal* which are unanimously held to be lawful such as uttering phrases of unbelief under duress. Shāṭibī, here, however, excepts from this rule the case of one who uses the confession of Islam to save his life. In their motives both cases are similar, for both aim at *al-maṣlaḥa al-dunyawiyya*. In the latter case, however, since the real intention is different from that of a *ḥīla*, i.e. one confesses but does not believe in Islam, he is seeking a *mafsada* in the hereafter, and hence the use of the confession is not lawful (387).

The third type of *ḥiyal* are those the legal validity or invalidity of which cannot be decided as clearly as in the above types. Neither is it clear that such *ḥiyal* agree with the intentions of the lawgiver nor can it be said that they oppose it. Hence it has been controversial. Shāṭibī illustrates this type with two cases; *nikāḥ al-muḥallil* (marriage of a divorcee with a second husband in order to make remarriage with the first husband lawful) and *buyū' al-ājāl* (sales on credit). Shāṭibī finds it impossible to decide in favour of or against the practice of these two *ḥiyal*. He is of the opinion that those who regard this type as forbidden, believe that it is against the *maṣlaḥa*, or in other words, is an intentional violation of *sharī'a*. He disagrees with this conclusion (388). Shāṭibī only provides the arguments of those who are in favour of these two *ḥiyal*, but does not give his opinion in favour or against them (391).

NOTES

1. The numbers in the parenthesis in the text of this chapter refer to the pages of *al-Muwāfaqāt* Vol. II (Cairo: Muṣṭafā Muḥammad, n.d.)

2. In Islamic Jurisprudence the obligations are classified into five categories: *wājib* (obligatory), *mandūb/mustaḥab* (recommended), *mubāḥ* (indifferent), *makrūh* (reprehensible) and *ḥarām/mamnūʿ* (forbidden) cf. above p. 9-10.

3. See above pp. 206 and 270.

CHAPTER FOURTEEN

CONTINUITY AND CHANGE

In the preceding chapters we have studied Shāṭibī's doctrine of the *maqāṣid* according to his own formulation and to the structure of his own presentation. We are now in a better position to infer the basic components of Shāṭibī's concept of *maṣlaḥa* and its significance in his legal philosophy.

As must be evident from Shāṭibī's definition of *maṣlaḥa* and its various aspects, the essential element in his concept of *maṣlaḥa* is the consideration for and protection of the necessities of human life. The five aspects of the *maqāṣid* serve further to establish this point. The first aspect reveals the necessary relation between human needs and *maṣlaḥa* and sets out further details of these human needs in different areas. The second aspect discusses intelligibility as a qualification of legal commands, which implies that a major role is allowed to human reason in the interpretation, justification and extension of the rulings of the *sharīʿa*. The third aspect discusses the doctrine that harmful things which impede the satisfaction of human needs are revokable. Contrary to the views of the ṣūfīs and some jurists the *maṣlaḥa* of man or the goal of law does not aim at the negation of these needs. The fourth aspect reveals the meaning of obedience. In its narrow sense, obedience means to comply without asking for the reason lying behind the command. This meaning of obedience applies essentially to the *ʿibādāt*. The other areas of life, for which

Shāṭibī uses the term *'ādāt*, are based on *maṣlaḥa*. There is a second meaning of obedience, therefore, in which obedience signifies to conform to the objectives of the lawgiver, or to obey the intent of the law. This sense applies both to *'ibādāt* and *'ādāt*, but implies that obedience in matters of *'ibādāt* means *ta'abbud* and in matters of *'ādāt* to follow *maṣlaḥa*, because these are the objectives of the Lawgiver. This point is elaborated in detail in the fifth aspect of the *maqāṣid*. The basic components of Shāṭibī's concept of *maṣlaḥa* are, therefore, the following: 1) the consideration for the needs of man, (2) the rationality of law and the responsibility of man, 3) protection from harm, and 4) conformity to the objectives of the Lawgiver.

The jurists preceding Shāṭibī had divided *maṣlaḥa* into *ḍarūrī*, *ḥājī*, and *taḥsīnī* types only to reject the latter two as less satisfactory bases of legal reasoning. Shāṭibī, in contrast to them, sees the latter two categories of *maṣlaḥa* as layers or zones that are meant to protect the *ḍarūrī* type; they complete and supplement the *ḍarūrī maṣlaḥa*. The rejection of the *ḥājī* and *taḥsīnī* categories may not immediately affect a *ḍarūrī maṣlaḥa* but, eventually, such a rejection may disrupt the *ḍarūrī* type as well. This structural approach to *maṣlaḥa* makes Shāṭibī's conception more integral than that of others.

Shāṭibī, however, distinguishes between two conceptions of *maṣlaḥa*. *Maṣlaḥa* as conceived in *'āda* is essentially *al-maṣlaḥa al-dunyawiyya*, which does not look beyond this world.

Maṣlaḥa conceived in connection with *sharī'a* takes into consideration *al-maṣlaḥa al-ukhrawiyya* in addition to *al-maṣlaḥa al-dunyawiyya*. Another factor that distinguishes the conception of *maṣlaḥa* in *sharī'a* is its simple and abstract nature. *Maṣlaḥa* in *'āda*, although conceived as not-mixed, yet is found always to be mixed with *mafsada* and non-*maṣlaḥa*. In *'āda*, the *maṣlaḥa* in an act is determined by weighing the elements of *maṣlaḥa* and *mafsada*; whichever dominates gives its name to that act. *Al-maṣlaḥa al-shar'iyya* does not reject this process and the conclusions drawn from it, yet as *al-maṣlaḥa al-shar'iyya* constitutes a legal obligation, it accepts only the dominant aspect as a requirement of obligation and rejects the other part for this purpose.

The relativity of *maṣlaḥa* in *'āda* and definition of *al-maṣlaḥa al-shar-'iyya* in reference to dominating *al-maṣlaḥa al-'ādiyya* is fundamentally important in Shāṭibī's legal thinking. Such a conception of *maṣlaḥa* gives

him the means to free Islamic legal theory from the rigidity with which traditional view had invested it on both the conceptual and the methodological levels.

On the conceptual level there were two main deterministic factors that discouraged any trend towards adaptability in Islamic legal theory. One of these factors was theological determinism springing from the concept of God as Omnipotent and Absolute Authority. The negation of causality in relation to God's actions and the denial of man's free will provided this determinism with further rigour. Shāṭibī's conception of legal obligation which takes *'āda* into consideration along with *sharī'a*, making *maṣlaḥa* the common element of the two, provides justification for man's responsibility for his legal acts, a responsibility that theological determinism would deny. The distinction between *'āda* and *sharī'a* as two different aspects of Divine Will, is a further attempt to solve the dilemma which theological determinism creates for Islamic law. The theological understanding of God's Omnipotence, which demands, by necessity, no disjunction between God's willing something and the actual occurrence of that thing, forced most of the theologians to hold that legal commands are not necessarily backed by the Divine Will; otherwise, they would be actualized immediately.

Shāṭibī rejected this mode of thinking. He emphasized that there is Divine Will behind legal commands, but this Will is *tashrī'ī* and, thus, distinguished from the type of Divine Will which is *takwīnī*. Man is not involved as an agent in the actualization of God's *takwīnī* Will, but he is involved in God's *tashrī'ī* Will. Since man is a *mukhtār* agent, the actualization of legal commands depends upon his choice. This position upholds the responsibility of man in legal acts; yet it does not reject the connection of Divine Will with legal commands.

The second deterministic factor was moral and ethical. It was introduced into Islamic thought by ṣūfīs. The ṣūfīs viewed the whole concept of obligation as devotion to God even to the extent of denying the necessities of human life. This attitude resulted in virtual neglect of the major part of *'ādāt* obligations as being *ḥuẓūẓ*. In relation to *'ibādāt* their view of obligation demanded for the sake of *ikhlāṣ* much more than formal fulfilment of the requirements of the law. *Zuhd* and *ikhlāṣ* thus constituted the basic elements of the ṣūfī concept of obligation which they termed *wara'*.

In his analysis of *ta'abbud* and *ḥuẓūẓ* Shāṭibī shows the irrelevance of ethical determinism for legal obligation. *Ta'abbud* means conformity with the objectives of law. Legal obligation does not demand more than what law has specified, and any additional requirement above and beyond the specifications of the law cannot constitute legal obligation.

Shāṭibī's concept of *maslaha* freed Islamic legal theory from its traditional rigidity on the methodological level as well. On the methodological level the question of how to apply and extend law to new situations was hampered by theological, linguistic and logical factors. On the theological plane, major opposition to *maslaha* came from the denial of cause (*'illa*) in legal reasoning. Shāṭibī tried to solve this problem by distinguishing between the *af'āl* and the *awāmir* of God. He argued that *'illa* can be attributed to God's *ahkām* and His *awāmir*, if not to His *af'āl*. Secondly he demonstrated that even the Qur'ān mentions *'illa* for specific commands. Thirdly, after making an analysis of Divine legal commands, Shāṭibī concluded that these commands not only have a purpose and motive but also that this purpose is the protection of the *maslaha* of mankind.

On the plane of language, legal formalism and literalism had been acceptable to jurists in general. Even the method of analogy and interpretation by implication, in the final analysis, inclined towards literalism. Shāṭibī rejected this method in two ways. First, by his theory of *al-dalāla al-aṣliyya*, he laid stress on the significance of meaning, more precisely on contextual meaning, rather than the letter of the law. Second, he emphasized that even in interpretations by implication the *maqāṣid* of the *sharī'a* should be the basis of reasoning. Such an interpretation required induction rather than deduction in the process of legal reasoning.

On the plane of logic, the fear of arbitrariness had become a major cause of the rejection of *maslaha*. Giving substance to the concept of *maslaha* by conceiving it as a structure and confining it to five specific areas of human needs, Shāṭibī defended the concept against its becoming merely personal and relative. Moreover, by suggesting that *maslaha* is based on *istiqrā'* rather than on the method of analogy from particular to particular, Shāṭibī argued that *maslaha* is based on surer grounds. The proponents of analogy argued that a decision reached by analogy having been deduced from a specific ruling of a legal text logically constituted *yaqīn*. Reasoning in terms of *maslaha* provided only *ẓann*. Using the same terms, Shāṭibī argued that the method of analogy led, at the most, to *ghalbat al-ẓann*, and not to *yaqīn*. A decision in favour of one *'illa*

does not remove the doubt that there may be another *'illa* which is more valid. Secondly there is no way to ascertain that the *'illa* for which one has decided is also the one in the mind of God. These decisions are based on one's best judgment which amounts to probability, not to certitude. If this be the case, a ruling based on induction is more valid than the one based on deduction from one particular ruling.

The above view of analogy attributed by Shāṭibī to its proponents is not wholly correct. In fact a judgment reached on the basis of *al-khabar al-wāḥid* (solitary tradition) is preferable to the one reached by analogy. Yet both solitary tradition and analogy are regarded as probable (*ẓannī*), not *qaṭ'ī* (certain). Shāṭibī is however criticising the predilection of the proponents of analogy for this method of reasoning over against reasoning by *maslaha* in relation to which they consider analogy more certain. Shāṭibī exposes the weakness of this predilection by arguing that reasoning by induction (i.e., *maslaha*) is better than by deduction.

In the light of the above analysis we can discern in Shāṭibī a trend towards a view of Islamic theory that permits adaptability. His understanding of *maslaha* as a principle of adaptability to human needs is based on certain distinctions that evolved out of his analysis of the concept. The most significant among these distinctions were those between *'āda* and *sharī'a* and between *'ādāt* and *'ibādāt*. For a better understanding of Shāṭibī's view of legal theory these distinctions need to be further analysed.

In Chapter three we noticed that in his *fatāwā*, Shāṭibī accepted 14 cases of social change and rejected 23 others. Among the rejected cases 12 belonged to changes in *'ibādāt* and 11 to changes in laws relating to family, property, and to contracts and obligations. He rejected changes in *'ibādāt* because he considered them to be *bid'a*. He rejected changes in cases of laws relating to family and property where they amounted to either confusion or violation of the individual right of ownership and partnership. He rejected changes in cases of contracts and obligations where they hampered the freedom of trade and commerce.

The fact that Shāṭibī did not accept or reject social change *in toto* and further, that he distinguished among various cases of change, indicates that Shāṭibī had a clear notion of change and of the interaction between social and legal change. In fact, as we shall see, in Shāṭibī's legal thinking social change and legal change are so much interrelated that one cannot be understood without the other. Although this relationship makes Shāṭibī's

views on change importantly relevant to the problem we are studying yet this complexity renders the analysis of his concepts much more difficult.

In the frame work of Shāṭibī's terminology, the problem of continuity and change should be discussed in reference to the following concepts: sharī'a, 'āda, bid'a, and ijtihād. An analysis of the term sharī'a in Shāṭibī's legal thought has been attempted above in detail in chapter seven. The concept of 'āda explicates the notion of social change and its relation to law. Bid'a presents a concept of legal change which is generally linked with social change. The concept of ijtihād explains the interaction of social and legal change. This chapter, therefore, now proceeds to an analysis of these three concepts.

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'ĀDA

Shāṭibī's discussion of 'āda turns around three problems; the constancy of 'ādāt, the possibility of their change and their relationship with sharī'a. Even his definition of 'āda shows these predilections. According to Shāṭibī, " 'Āda means only this that a given act, if it is supposed to happen without any impediment, happens only in a certain manner which is known by other similar acts."[1] Shāṭibī's definition partially resembles the theory of determinism. This deterministic element is the constancy of occurrence of 'ādāt which Shāṭibī calls istiqrār (persistence) and istimrār (continuity).[2]

The continuity of 'ādāt is a necessary condition without which the fulfilment of a lgeal obligation cannot be conceived. The other element is the certainty and predictability of the 'āda, as Shāṭibī says, "the occurrence of 'āda in the world of existence is a known (ma'lūm) matter not a conjecture (maẓnūn)."[3] Both elements are such that their absence makes any law impossible.

> If a divergence (ikhtilāf) is presumed in 'awā'id,[4] it would necessitate a divergence in law-making (tashrī'); in the classification of law (tartīb) and in its promulgation (khiṭāb), and the sharī'a would not be the same as it is now.[5]

Shāṭibī uses the term 'āda in various meanings; sometimes he means simply habits and human behaviour,[6] on other occasions it is equivalent to custom.[7] It is also contrasted with 'ibādāt so as to mean what the other jurists generally call mu'āmalāt.[8] In fact Shāṭibī's use of the term is inclusive of all these senses. This interpretation is admissible if we recall that Shāṭibī contrasts sharī'a or 'amr with kawn.[9] The 'āda, then, would be related to kawn or the physical world, as the counterpart of aḥkām al-sharī'a.

Shāṭibī's concept of the continuity of 'āda is questioned on two points, first on the ground that the continuity of a certain thing in this world is equivalent to the beginning of its existence, because for its continuity as for its existence it also requires an agent who, however, may possibly become non-existent. During the first period the continuity of the

non-existence of that thing was possible, but when it was brought into existence, one of the two possiblities was achieved, i.e. its existence; the other possibility i.e. its non-existence still remains to be actualised. When it is possible to conceive the possibility of its discontinuity, how can one talk with certainty about its continuity?

The second objection is that very often events occur contrary to *'āda* (*khawāriq al-'āda*). This fact of actual occurrence supplements the above argument about the potential possibility of non-continuity of *'ādāt*. How then can it be maintained that the occurrence of *al-'ādāt* is known with certainty?

Shāṭibī replies that it is by tradition (*sam'*) that we know the possibility of continuity. The possibility of discontinuity maintained in the objection does not contradict the position of tradition, because the notion of possibility is logical (*al-jawāz al-'aqli*), while tradition is not concerned with possibility but with occurrence (*wuqū'*). Many a thing happens although logically it is possible for it not to happen. In fact the term "possibility" (*jawāz*) refers to the "possible" itself, while "necessary" (*wujūb*) and impossible (*imtinā'*) refer to some external factor. Thus the latter cannot be contradictory to the former.

Second, the certainty and predictability in *'ādāt* do not concern each and every *'āda*. Essentially they concern the universals of being (*kulliyāt al-wujūd*), not the individuals. Hence if an individual deviates, this does not refute the universal. The argument from *khawāriq al-'āda* refers to individuals. Furthermore, it is the occurrence of *khawāriq al-'āda* that assures our knowledge about the universal *'ādāt* and *vice versa*.[10]

From the above it can be seen that in a fashion similar to his views on *sharī'a*, Shāṭibī believes in the continuity of only those *'awā'id* which are universal. The acceptance of their continuity is not only an actual fact, but it is also necessitated by the requirement of a stable base for law. The *'awā'id* which accept change are more in number than those which are immutable. *Kharq al-'āda* is not a proper example of changing *'ādāt*; in fact *kharq al-'āda* is a breach of a universal *'āda*, and hence it happens seldom. Shāṭibī, therefore, dismisses *kharq al-'āda* as a serious objection to the continuity of *'ādāt*, as well as an example of change.

Shāṭibī classifies *al-'awā'id al-mustamirra*, in reference to *Shāri'* into

two kinds: *shar'iyya*, which are introduced or sanctioned by *sharī'a* and *al-'awā'id al-jāriya bayn al-khalq*,[11] those which are current among people. These two categories are not exclusive of each other; the first category also belongs to the habits and customs of the people. *Shar'* necessarily gives consideration to *al-'awā'id al-jāriya*, because in fact Divine law (*Sunnat Allāh*) corresponds with the *'awā'id* in general; hence the *sharī'a* was instituted in commensuration with the institution of *'awā'id*.[12]

Shāṭibī believes in the relationship of *sharī'a* to *'āda* more than in the relation between *sharī'a* and *'aql*. As mentioned earlier, it was in the periods of *fatra* that the philosophers (*'uqalā'*) claimed to know good and evil by reason alone.[13] According to Shāṭibī, this was possible, in fact, only because the values of good and evil already existed as instituted in *'ādāt*, although they were confused. This is why Shāṭibī finds that the *sharī'a* has not rejected *'ādāt* entirely. In the case of the *sharī'a* of Muḥammad, indeed, the *sharī'a* confirmed most of the *'ādāt* practiced by the people in the pre-Islamic period. Examples of such laws are the following *'ādāt* which were regarded as good in the pre-Islamic period and were also adopted by Islam: *diya* (blood money), *qasāma* (compurgation), gathering on the day of *'arūba* (the ancient Arabic name for Friday) for sermons, and *qirāḍ* (loan), etc.[14]

Shāṭibī illustrates the relation of *sharī'a* and *'āda* by the case of *khamr* (intoxicant). "It was habitually used in pre-Islamic days. Islam came, and left it intact in the period before Migration and a few years after. The *shar'* did not pronounce any law regarding *khamr* until the verse 'They ask you about *khamr* and *maysir*. . .' was revealed. Then he explains that "the fundamental rule of *sharī'a* is that when an evil (*mafsada*) in a thing transgresses the good (*maṣlaḥa*), it is evaluated as evil. The evils are prohibited, hence the reason for its prohibition is clear. In cases where the *sharī'a* has not pronounced the prohibition, even though this aspect of its evaluation is apparent, the people will act upon the supposition that the original law established by the continuity of practice (*'āda*) remains intact."[15]

Shāṭibī's discussion of the relationship of *sharī'a* and *'āda* implies the aspect of change as well. The *sharī'a* can change *'āda* in certain cases, and *vice versa*, but more important is the fact that when a change takes place within an *'āda*, it also effects a change in the rule of *sharī'a*. A thing which was relatively good becomes evil or vice versa; the *sharī'a* has to adjust itself accordingly. This takes us to Shāṭibī's view of legal change.

First we will discuss the aspect of change in *'āda*, then the problem of legal change will be dealt with.

It should be noted here that in the usage of the term "change" Shāṭibī includes both 'horizontal' and 'vertical' senses of change. The former is the change which a certain social practice, when it travels to other societies and countries, manifests itself in the differences of *'ādāt*. The latter is the replacement of old *'ādāt* by new ones, or the development of these *'ādāt* by additions or modifications. For the 'horizontal' change his term is *ikhtilāf* and for the 'vertical' he uses the terms "*taghyīr*" and "*tabdīl*".

Beside *al-'awā'id al-shar'iyya* which do not change, Shāṭibī divides *al-'awā'id al-jāriya* into two: first, *al-'awā'id al-'āmma,* which do not change with time, place or state and second, those which change. In the first category, Shāṭibī mentions the *'awā'id* of eating, drinking, joy, sorrow, acquiring nice things, etc. The evaluation in these categories has been established on the basis of the *'awā'id* of past generations; they have never changed. In fact they are based on the Divine law in Creation [law of nature].

In the second category are the *'awā'id* such as the forms of dress, styles of dwelling, etc., which change with time, place, and states. In this category, therefore, it is not correct to evaluate *'awā'id* in absolute terms on the basis of past experience. Even if there is found some external evidence which proves the continuity of such an evaluation, it must be kept in mind that this decision of evaluation was made because of some external factor, not because of *'āda* itself. Similarly the decision of evaluation in the present cannot be carried on into the future, or to the past. The reason for this temporal limitation is the probability of change.[16]

Shāṭibī discusses five senses of this change.[17] The first is exemplified by the difference of social values, good (*ḥusn*) and evil (*qubḥ*). For example, keeping the head uncovered is regarded as evil in eastern countries but not so in western countries. Second, there is the change that results from the difference of technological levels. This change usually takes place among various peoples (*'umam*), but it also occurs within one people, e. g. the differences of the technical vocabularies among men of various trades and professions. Third, there is the difference of acts in *mu'āmalāt* (dealing with each other), like the *'āda* (custom) of receiving a

dowry (*ṣadāq*) before the consummation of a marriage. Fourth, there is the change resulting from the difference of considerations which are external to the acts in question, for example, the difference in the criterion of maturity (*bulūgh*) among various people, whether on the basis of puberty or on the basis of age. Fifth, there is the case of irregular *'awā'id* which become regular *'ādāt* for some peoples or individuals, for instance a person who, due to certain injuries, can no more urinate in the regular manner. The irregular manner of his urinating becomes an *'āda* for him.

The illustrations of changing *'awā'id* show that Shāṭibī admitted change in *'āda* in both 'horizontal' and 'vertical' senses. This would then imply that *sharī'a* insofar as it is related to *'āda* must also admit change.

Shāṭibī discusses the problem of change in *sharī'a* in at least six aspects. The first aspect is that of the universal principles on which the *sharī'a* is based and which underlie the Meccan part of the Qur'ān. These principles are also called *maqāṣid al-sharī'a*, and they never change.

The second aspect is that of *al-'awā'id al-shar'iyya*. As mentioned earlier, they are the *'awā'id* introduced or sanctioned by *sharī'a*. In contrast to the universal principles, they are more specific and concrete rules of law. According to Shāṭibī they also do not change. "Because," Shāṭibī explains, "they are among the rules of *sharī'a*. Hence they do not change. Even if the opinions of the *mukallafīn* (subjects of law) differ about them, it is not correct to change good into evil... For instance it cannot be argued that since the acceptance of the witness of a slave is not disdained by the *'ādāt,* hence it is allowed... If this were permitted it would constitute abrogation of the rules which are constant and continuous, whereas abrogation after the death of the Prophet is not valid (*bāṭil*)."[18]

The third aspect concerns those *'awā'id* which are either a means or a mediate cause (*sabab*) to the fulfilment of certain rules of *sharī'a*, like the physical capability to perform an act, the *'awā'id* about maturity, etc. "Since they are mediate causes (*sabab*) for the 'caused act' (*musabbab*), they are also commanded by the Lawgiver. Hence there is no difficulty in giving them due consideration and accepting them as the basis of rules."[19] The problem then is to ask whether the rules of *sharī'a* would change if this basis changed. Shāṭibī replied in the affirmative, saying "The rule of *sharī'a* will always be in consonance with these *'awā'id*."[20]

The fourth aspect is that of *al-'awā'id al-mutabaddila,* the five senses of which have been mentioned above. Shāṭibī explicitly argues that the rules of *sharī'a* must accord with the changes in this category of *'awā'id.*

The fifth aspect concerns the legal changes which imply that certain matters are not covered by *sharī'a* and hence additional rules are required. Shāṭibī stresses here the need for further investigation. A certain *ḥadīth* lays down the rule that 'the matters on which the Lawgiver is silent, are *'afw* (forgiven). This *ḥadīth* admits that *sharī'a* does not cover everything. The *ḥadīth,* however, renders the position of those jurists questionable who maintain that there is nothing *maskūt 'anhu* (where lawgiver is silent), because they claim that every case is either covered by the text (*manṣūṣ*) or is coverable by analogy with the text. To avoid the conflict with the above *ḥadīth,* they explain that Shāri''s silence can be removed in a number of ways; for instance, by way of *istiṣḥāb,* or by referring to the Shāri''s explicit proclamations in laws revealed before Muḥammad, or by confining the interpretation of the text to the generality of a specific ruling by disregarding its modifications if they are not mentioned immediately after the ruling.[21]

Shāṭibī goes into a detailed analysis of the nature of this silence. He divides this silence into two types. First is the type of silence where there was no immediate cause for issuing a command and hence the Lawgiver did not say anything. Second is the type where such a cause existed but the Lawgiver still kept silent. Quite naturally, the second type is a form of prohibition. To interpret this silence as absence of ruling would thus lead to introducing a *bid'a.*

The first type is what can be properly called "silence". Because of its obvious significance, Shāṭibī's explanation on this point needs to be quoted in his own words.

> One of them [the aspects of silence] is, that he is [found] silent because there was no motive (*dā'iya*) that necessitated any [ruling]... For instance the events that occurred after the (death of the) Prophet. They certainly did not occur in his lifetime and hence none can say that the Lawgiver said nothing about them, even though they occurred. They took place later and hence the people of *sharī'a* were obliged to examine those events and to execute them according to what had been established as universal principles.

The new things that the righteous ancestors introduced in Islamic law belong to this type. The examples of this type are *al-maṣāliḥ al-mursala* such as the collection of the Qur'ān etc... These are some of those things that were not discussed in Prophet's days, nor were they enquired about. Nor did they find place in social practice so that a cause for such an enquiry might arise.[22]

As a second instance, we may cite the category of *'afw* which according to Shāṭibī falls between the *ḥalāl* (lawful) and the *ḥarām* (forbidden). This category also proves that he not only admitted the possibility of matters not covered by *sharī'a,* but also that they fall under the category of *'afw* (silence or indifference of the lawgiver).[23]

The sixth aspect of change is what Shāṭibī calls *iḥdāth fī al-sharī'a* (innovation). Shāṭibī does not believe in the legitimacy of every *iḥdāth.* He argues that *iḥdāth* occurs in *sharī'a* in three ways. It happens first because of ignorance or neglect of the objectives of law. This is either ignorance of the tools that lead to an understanding of the objectives, such as ignorance of the Arabic language and its grammar, or it is ignorance of the objectives themselves.

A second reason for *iḥdāth* is *taḥsīn al-ẓann bi'l 'aql,* to decide the value of a thing on the basis of merely rational speculation. A third cause is following one's own desires in seeking the truth. In such a case the desire dominates and even conceals the true evidences and leads to false conclusions.[24]

Bid'a is one aspect of the *iḥdāth.* *Iḥdāth* can occur in all subject matters of *sharī'a,* while *bid'a,* according to Shāṭibī, is limited to certain aspects. This distinction requires a rather detailed analysis of Shāṭibī's concept of *bid'a.*

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BID'A

Shāṭibī's book *al-I'tiṣām* is specifically designed to discuss the problem of *bid'a*. We need not go into the details of his arguments; what concerns us here is to discuss *bid'a* as a legal change and the problem of its legitimacy.

Shāṭibī vehemently condemns *bid'a* on more than nine grounds.[25] His reasons for condemnation can be summed up by saying that since *sharī'a* is complete and final, anyone who innovates, commits, among other sins, two grave errors. One is the implication of equality or rather superiority to God, the original Lawgiver, because the promulgation of *bid'a* implies that the innovator knows more than God about *sharī'a*. Second, he relies more on human reason and desires than on the intentions of the Lawgiver.[26]

Shāṭibī's condemnation of *bid'a* cannot, however, be taken as condemnation of any and all legal changes. Not only would such a conclusion not conform with his views discussed above, but it would also give a wrong idea about Shāṭibī's understanding of the concepts of *bid'a* and *ijtihād*.

Shāṭibī explains that etymologically *bid'a* comes from *bada'a* which means to invent something new, the like of which has not existed. In a technical sense, however, this "new-ness" and "invention" is only in reference to *sharī'a*.[27] In reference to *sharī'a* human acts can be of three kinds: required, prohibited, or voluntary. The category of prohibited actions is governed by two considerations. First, simply that it is prohibited by law, second, that it literally opposes the rules of *sharī'a*. It is the latter consideration to which the technical sense of *bid'a* pertains.[28]

Shāṭibī gives two definitions of *bid'a*. The first is a definition that does not include *'ādāt*; the second includes both *'ibādāt* and *'ādāt*. The first definition is as follows:

> A way (*ṭarīqa*) of innovation in religion (*dīn*) that resembles the way of *sharī'a* (*tuḍāhī al-ṭarīqat al-shar'iyya*) and which is intended to be followed

in order to strive in the utmost toward obedience (*ta'abbud*) to Allāh.[29]

The second definition replaces the phrase 'in order to strive...' with the following qualifying clause: "with the same intentions that Shāri' aims for." [30]

Shāṭibī even goes further to clarify the qualifications included in the definition. It is relevant to note some of these qualifications. The qualification of 'religion' (*dīn*) is significant because according to Shāṭibī "if this way of innovation belongs to *dunyā* (mundane matters) exclusively, it would not be a *bid'a*." Examples cited are innovations in crafts, in plans of cities, etc.[31] The qualification of 'innovation' excludes those matters which have their bases in *shar'*.

The qualification of 'intention of similarity with *sharī'a*' is also very important. Shāṭibī is admitting that the intentions of the innovators are not bad in themselves, but he implies that they misunderstood the purpose of *sharī'a*. Shāṭibī does not equate *bid'a* with heresy only because it is a new thing. The key terms in this respect are 'intention' and the 'right understanding of the purpose of *sharī'a*.' How is this right understanding to be judged?

In one respect right understanding means correspondence of both intention and acts with the purpose of *sharī'a*. Shāṭibī elaborates the relationship of intention and act to the purpose of *sharī'a*, by describing four situations. First, if the intention of an act and the act itself conform with the purpose of *sharī'a*, the act certainly is valid. Second, the act is not valid if the act and the intention do not conform with *sharī'a*. Third and fourth are the cases where one of them (the intention or the act) conforms and the other does not. Shāṭibī makes a distinction; if the intention conforms and the act does not, it is to be called *bid'a*. If the act conforms but the intention does not, the act belongs to the category of *ri'ā* and hypocrisy.[32]

Al-maṣāliḥ al-mursala illustrate the type of new things where the intention and the act both conform to the purpose of *sharī'a*.[33] An example of this type is the levying of new taxes in addition to those prescribed in the texts. The conformity of the act with the purpose of *sharī'a* and the intention in this case show the right understanding of *sharī'a*, and further, the intention does not conflict with the objectives of *sharī'a*.

In fact it is this conformity of *al-maṣāliḥ al-mursala* with the *maqāṣid al-sharī'a* that disassociates them from *bid'a*. Shāṭibī disagreed with the

jurists who identified *al-maṣlaḥa al-mursala* as *bid'a*.³⁴ To him the two were
compeltely opposed to each other.³⁵ To refute such views he argued that
first of all the jurists are not agreed upon an exact definition of *al-maṣlaḥa
al-mursala*. Even Ghazālī expressed two different views on this point.³⁶
Secondly, Shāṭibī explains, *al-munāsib al-mursal* (synonymous with *al-
maṣlaḥa al-mursala* in Ghazālī's terminology) which is neither specifically
supported by the legal text nor is it rejected, is not a *bid'a*. On the contrary
it is supported by the existence of the genus which is common between
al-sharī'a and *al-maṣlaḥa al-mursala*, and, furthermore, this genus is
considered valid by *sharī'a*. Its validity is not based on a specific evidence
but on its consideration as a whole.³⁷

Shāṭibī illustrates *al-maṣāliḥ al-mursala* with ten examples. Among
them are the following events from Islamic legal history: the collection
of the Qur'ān; determining the penalty for using intoxicants; allegiance
to a less qualified person for an office in the presence of a better qualified
one.³⁸ He finds three elements common in all the ten examples. First is
the element of suitability with the objectives (*maqāṣid*) of *sharī'a*³⁹.
Al-maṣāliḥ al-mursala do not conflict with the fundamentals or with the
evidences of *sharī'a*. Second, they are rationally intelligible. *Al-maṣāliḥ
al-mursala* do not belong to *ta'abbudāt* because the latter are not ration-
ally intelligible in detail. Shāṭibī gives more than ten examples to
prove this point.⁴⁰ Thirdly, *al-maṣāliḥ al-mursala* refer to the following
principles: protection of (human) necessities; removal of impediments
which are harmful to religion; and protection of an indispensible
means to the end of law.⁴¹

Shāṭibī, thus, shows that the acceptable *maṣāliḥ* cannot be equated
with *bid'a* and that they are not limited to the category of *ḍarūrī*, as some
jurists have maintained; they cover other categories as well. In fact, the
above explanation of *al-maṣlaḥa al-mursala* conforms to Shāṭibī's concept
of *maṣlaḥa* which is of fundamental significance to his doctrine of *maqāṣid
al-sharī'a*.

In the case of *'ibādāt* the intention of similarity with *sharī'a* leads
to an extension of the sense of *ta'abbud*. For instance, in Shāṭibī's period
the practice of chanting the names of God (*al-dhikr*) in congregation
was considered obligatory.⁴² Such an intention is absent in the
innovations in *'ādāt*. Nevertheless wherever this intention (of similarity)
is absent in a new thing, even though there be similarity in actuality,
such a new thing will not be regarded as *bid'a*.⁴³ Shāṭibī gives the

following as the examples of the last type of new things: taxes levied on
property in a specific proportion and amount that resemble *zakāt;* use of
sieves; washing hands with *'ushna* (potash); erecting lofty buildings, etc.⁴⁴

Lack of such distinctions as above, in various types of 'new things'
in Islamic law, had made the concept of *bid'a* both confusing and contro-
versial. The jurists who would accept nothing new in Islamic law rejected
bid'a absolutely. Some jurists maintained a broad distinction between
good and bad *bid'a*. Scholars such as Ibn 'Abd al-Salām and Qarāfī have
even divided *bid'a* into five categories corresponding to the five categories
of legal valuation: obligatory, recommended, indifferent, reprehensible
and forbidden.⁴⁵ Shāṭibī regards such a division as meaningless and irre-
levant. With the exception of those *bid'a* mentioned by these scholars in
the categories of 'reprehensible' and 'forbidden' the others are not *bid'a*
at all.

Shāṭibī refined the meaning of the concept of *bid'a* and made it
more precise by clarifying his terminology and fitting it into a proper
framework of legal philosophy. He showed that the *bidā'* are of two kinds
only, *ḥaqīqiyya* (absolute) and, *'iḍāfīyya* (relative). *Al-bid'a al-ḥaqīqiyya* is
that which is not proven by any *shar'ī* evidence like the Qur'ān, Sunna,
ijmā' or a reliable basis of reasoning, neither in general nor in par-
ticular. *Al-bid'a al-iḍāfīyya* is that which touches upon both aspects.
In one aspect it is connected with *shar'ī* evidence; in the other it is not.
It is only in the latter aspect that it is *bid'a*.⁴⁶

The common point in the two definitions of *bid'a* given by Shāṭibī,
is the intention of the innovator to equal the Lawgiver. Obviously this
common point can be taken as the essence in Shāṭibī's concept of
bid'a. Real *bid'āt* according to Shāṭibī, however, are only those which
belong to *'ibādāt*. Shāṭibī argues this point in two ways. First he
refutes the thesis of his opponents who maintain that were innovation
possible in *'ibādāt*, it would also be possible in *'ādāt*. Furthermore, there
are a large number of *aḥādīth* which predict the occurrence of new
things in later periods which proves the possibility of *bid'āt*.

Shāṭibī dispels this objection by saying that the dispute is not
about the possibility but about the actual occurrence of *bid'a* in *'ādāt;*
hence the argument of 'possibility' is not valid. As for predictions
in *aḥādīth*, the argument is misleading. These particular *aḥādīth*
do not call all of these changes *bid'a*, and moreover, these matters are not

condemned there because they are innovations. Shāṭibī continues by saying that were every new thing in 'ādāt regarded as bid'a, then every change in matters such as eating, clothing, speaking, etc., would stand condemned.[47] He sums up his argument in the following fashion:

> There are 'awā'id which change with time, place and persons. If every change is condemned then everyone who differs in this respect with those Arabs who were in contact with the companions of the Prophet... will be considered as not following them and hence deviating from the right path. This is quite difficult to accept.[48]

The implications of the above statement are fundamentally important for the question of legal change. Shāṭibī, here, is saying that there are large areas of life — in fact everything except 'ibādāt — where the concept of bid'a does not apply. The implication is that sharī'a does not control these areas of life or at least does not control them in the same sense as it controls the relations between man and God.

Shāṭibī's second manner of argument against including 'ādāt among bid'āt is the consideration of ta'abbud. As mentioned earlier, from the viewpoint of shar', acts of the mukallafīn are of two kinds; 'ādāt and 'ibādāt. It is generally agreed that 'ibādāt are ta'abbudī, but there is disagreement whether 'ādāt are also ta'abbudī. Shāṭibī defines ta'abbudī as "that the meaning of which cannot be rationally understood from the act itself". Matters such as ritual cleanliness, prayers, fasting and pilgrimage are all ta'abbudī. Matters such as those whose meanings can be rationally understood and whose goodness or badness can be known are 'ādī. Examples may be seen in the acts relating to sale, marriage, lease and punishment for crimes. It is in this sense that 'ādāt are not ta'abbudī, and hence the term bid'a is not applicable.[49]

In the light of what has been said so far, it is possible to reconstruct Shāṭibī's theory of social and legal change as follows.

One finds a significantly elaborate conception of social as well as legal system in Shāṭibī's thought. The conceptions of these systems emerge from Shāṭibī's analyses of 'awā'id and sharī'a. It must, however, be noted that Shāṭibī sees both of these systems originating from one source, God. Yet as they represent two different levels of Divine Will, they do not function in the same way. 'Āda represents the level of al-irāda al-takwīniyya, where man has no choice but to obey the rules. In sharī'a, obedience depends on man's choice. Human acts insofar as they belong to al-irāda

al-takwīniyya, obey the laws of takwīn necessarily, but those acts which belong to al-irāda al-tashrī'iyya necessarily need man's intention and volition for obedience. 'Awā'id which cover habits of an individual and in reference to social practices of the community in conformity with the laws of nature (kulliyāt al-wujūd) resulting from al-irāda al-takwīniyya provide the deterministic element that stabilizes the function of a social as well as a legal system. There are, of course, some deviations (khawāriq) from this continuity of 'awā'id, but these deviations establish (rather than refute) the factor of stability. Such 'awā'id as continue to occur are called al-'awā'id al-mustamirra and the rules of sharī'a have their basis in this type of 'awā'id.

The connection of sharī'a with the recurring 'awā'id makes possible for sharī'a to be eternal and continuing. The eternity of sharī'a does not originate from the continuity of 'awā'id, in the sense that the concepts and rules of sharī'a become eternal because of these 'awā'id. In fact sharī'a forms the ultimate basis which are abstract, universal and general and, thus, is believed to be unchanging. The continuity of 'awā'id makes the actualization of these ultimate bases possible.

Shāṭibī clarifies that human reason alone could not discover these ultimate bases, hence this knowledge was revealed in two ways: on the one hand it was instituted in 'awā'id, and on the other, it was revealed through sharā'i'. Human reason was led either to total laxity or to sheer determinism in its attempt to discover these ultimate bases. Consequently revelation of sharā'i' was necessary to save man from such extremes. Leaving aside the question of how the revelation of sharī'a differed from the attempts by human reason in this respect or how far it is a denial of any role to human reason, what is notable here is Shāṭibī's attempt to explain that sharī'a aims at the good of mankind. And that this good is judged in relation to and on the basis of 'awā'id.

With the exception of universal principles, the 'awā'id are, however, subject to change. Sharī'a is based on the unchanging principles of 'awā'id, which are thus called al-'awā'id al-shar'iyya. Nevertheless the 'awā'id which belong to human beings (al-'awā'id al-jāriya bayn al-khalq) may change. Since sharī'a governs these 'awā'id as well, it must respond to these changes. The mechanism of this response to social practices gives birth to legal systems.

Shāṭibī illustrates some of such changes. The legal system faces one

type of change when an individual, coming from a different social system, becomes the subject of another legal system, or a legal system is introduced where a different social system is in function. Obviously this change does not affect the fundamentals as the '*awā'id* on which *sharī'a* is based are universal. Nevertheless this change requires to be accommodated in order to maintain the stability of the legal system. The second type of change occurs when the old practice no longer satisfies human needs, or when some new elements either from without or from within are introduced. Yet another type of change is introduced when social practices or institutions come into conflict with each other or with the purpose of law; this conflict may arise from a clash of personal interests or because of certain new developments in society. Whatever the cause, the change in a social system takes place in such a manner that it requires the legal system to respond to these changes.

The need to respond to social changes is essentially the result of the aim of the legal system at its own as well as at the stability of the social system. Since the possibility of change is unending and the rules of law are limited, it is out of this necessity that the legal system is organized on rational basis both in its principles and methods, so that it is manageable by human reason. According to Shāṭibī since human reason alone cannot achieve such organization, *sharī'a* has provided men with general guidelines. Among these guidelines some can be tested in social practice and some not. Those which cannot be tested are '*ibādāt* and they are to be obeyed as such. Of those which can be tested and which are rationally intelligible are '*ādāt*. The latter constitute the major area of human acts. Since it is possible to rationally organize the '*ādāt* the *sharī'a* has left the details to be worked out by legal reasoning.

The Islamic legal theory, insofar as the principles are concerned, has been revealed in its entirety in the Qur'ān. Shāṭibī divides the injunctions of the Qur'ān into three categories: First the injunctions declaring lawfulness of things, second the declarations of prohibition and the third category is '*afw* which refers to those situations that are not covered by *sharī'a*. Such situations will be decided by leagal reasoning, the guidelines for which are provided in the other two categories.

The decision about the situations not covered by *sharī'a* may mean application of established rules or it may mean extension of these rules. Shāṭibī does not accept extension in the case of '*ibādāt*, but only in '*ādāt*. The reason is that in '*ibādāt* it is only God who can decide what is good for

men. Consequently, the Qur'ān being the last and complete revelation, contains all that man needs. Hence there is no need of extension of '*ibādāt* beyond what the Qur'ān prescribes. Shāṭibī regards such an extension as *bid'a* which is to be condemned.

While '*ibādāt* are not rationally intelligible, the '*ādāt* are. Moreover, often in the Qur'ān, an '*illa* is mentioned in case of '*ādāt* which means that *sharī'a* not only considers them intelligible, but also extendible.

Since the human reason is considered incapable of discovering the *maṣāliḥ*, yet as there will be no more revelation of *sharā'i'* after the Qur'ān, the situation demands that some system must be evolved to respond to the changes and to extend and apply the rules of law. According to Shāṭibī this is achieved through the institutions of *futyā* and *qaḍā'*.

The process of legal reasoning through which a *muftī* responds to a social change in the framework of the legal system is called *ijtihād*. *Ijtihād* is not simply a process of adaptation of legal theory to social changes but it also aims at a rational attempt to accommodate the change and still maintain the continuity of a legal system.

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IJTIHĀD

For a better understanding of Shāṭibī's discussion of *ijtihād* we need to consider a few technical details first.

A new case may either be provided for in the body of the rules of law or not. Further, this provision may either be implicit or explicit. An implicit provision may either be in form of general rules or in the form of permission derived from the absence of any prohibition. The need and method of legal reasoning both depend on the nature of these provisions. In some cases *ijtihād* may be continuously needed, while in other cases it may not be necessary.[50]

The dependence of the method of legal reasoning on the legal provision means that to justify the validity or invalidity of the new case it needs to be examined in reference to these provisions. This justification is exercized by demonstrating the correspondence of the essential elements in the new case with the basis of the legal provision. These bases which are called *manāṭ*, may be explicitly known, or can be discovered by further *ijtihād*.

Shāṭibī divides *ijtihād* in reference to these *manāṭ*, into four types.

1. TAḤQĪQ AL-MANĀṬ AL-'ĀMM

[General verification of the basis of the rules of *sharī'a*.]

In this case, the rule (*ḥukm*) in its *shar'ī* precept (*mudrak*), as its basis, is already established. The function of the *mujtahid* is to *verify* the application of these general bases in the subjects of law, but still in a general and universal sense.[51]

In other words the basis of the legal provisions are examined so as they are applicable to all the *mukallafīn*. The generality, here, is further explained by Shāṭibī to mean that this type concerns *anwā'* (species, types) of *mukallafīn*, and not the *ashkhāṣ* (persons, individuals).[52] It is called 'general' to distinguish it from the second type of *ijtihād*, which is specific. Shāṭibī illustrates this point with the *shar'ī* ruling that requires a witness to be *'adl* (just). The general and broad meaning of *'adl* is known, but to

determine the characteristics and qualifications on the basis of which a witness can be typically described as *'adl* is the function of a *mujtahid*. In order to evaluate this qualification in case of a particular witness *ijtihād* is required.[53] *Taqlīd* cannot solve this problem, because this process of evaluation can never end. Every new case is unique in itself in this respect.[54] Furthermore, *sharī'a* does not pronounce its rulings to cover all particular cases individually. The rulings of *sharī'a* are general and abstract so that they can cover any new cases which are infinite[55].

This is because of the above reasons that Shāṭibī regards this type of *ijtihād* as evercontinuing. If one admits the discontinuity of this *ijtihād*, one makes the application and extension of the rules of *sharī'a* impossible.[56] Human acts never happen in the abstract, they always happen concretely and as individual cases. If this type of *ijtihād* discontinues, the obligations of *sharī'a* will exist only in man's minds, and not in practice.[57]

2. TAḤQĪQ AL-MANĀṬ AL-KHĀṢṢ

This type is different from the first one, as it concerns *ashkhāṣ* (individuals) of a rule. This is more detailed and particular. For this a *mujtahid* relies more on *taqwā* (piety, prudence) and *ḥikma* (wisdom, inner reason).[58]

3. TANQĪḤ AL-MANĀṬ

[The refinement of the basis of the rule].

This type concerns those cases where the proper qualification (*waṣf*) is mentioned in the text of the ruling but in conjunction with another matter; the task of separating and refining this qualification is done by *ijtihād*.[59] Shāṭibī further explains that this type does not concern with the method of *qiyās*, but is rather a type of *ta'wīl al-ẓawāhir* (interpretation of the literal sense).[60] In a certain sense it also belongs to what Shāṭibī calls *al-ijtihād bi'l-istinbāṭ* (reasoning by inference).[61]

4. TAKHRĪJ AL-MANĀṬ

[Deduction of the basis of the rules].

This type refers to the text of a ruling where *manāṭ* are not mentioned. The *manāṭ* are found through the process of deduction. This method is also called *al-ijtihād al-qiyāsī* or reasoning by analogy.[62]

Shāṭibī maintains that among these four types, the first is ever continuing,[63] but the continuity of the other three depends on their need. The reasons for the continuity of the first type have already been noted. Shāṭibī explains the need of continuing the other three as follows:

> The new events which were not known in the past are very few, in proportion to those which have occurred in the past, because of the expansion of the body of rules due to the investigation and *ijtihād* of the preceding jurists. It is therefore possible to accept their decisions (*taqlīd*) in the major part of *sharī'a*.[64]

The need for *ijtihād* was often justified by the jurists by arguing on the basis of *khilāf*. In other words if the opinion of scholars differed on a certain point, the case was considered open for *ijtihād*. For Shāṭibī this implied *khilāf* in *sharī'a*, which he vehemently rejected. He maintained that in its basis *sharī'a* has unity; *khilāf* is neither intended to exist nor to perpetuate.[65]   Hence *khilāf* in this technical sense is not sufficient to justify continuity of *ijtihād*.[66]   What justifies *ijtihād* is the absence of rules to cover new cases.

In reference to legal material required for *ijtihād*, Shāṭibī finds in *ijtihād* three processes. One that depends on inference and deduction and hence is connected with written legal material. For this type a knowledge of Arabic language is inevitable. Shāṭibī clarifies that he does not mean the knowledge of grammar, syntax, etc., but rather a knowledge of Arab usage.[67]   The second process of *ijtihād* is that where it is not directly concerned with the text, but with the law itself. For this process of reasoning, one requires a grasp on *'ilm maqāṣid al-shar'* (the knowledge of the purpose of law).[68]   In reference to the above-mentioned four types of *ijtihād*, the present process is particularly relevant to *taḥqīq al-manāṭ* and *takhrīj al-manāṭ*.

The third relates to deductions which require neither of the above types of knowledge.[69]   This process is, in fact, the application of the verified *manāṭ* to specific cases. Consequently in this type of reasoning, two premises are involved; first *taḥaqquq al-manāṭ* (investigation of the basis of ruling) and second *taḥakkum* (decision).[70] Shāṭibī explains further that the method of deduction of conclusion in *ijtihād* is quite different from what is followed by logicians. The premises here do not mean the formulation of propositions in accordance with the figures (*ashkāl*) of syllogism known in logic. Nor does *ijtihād* depend upon considerations of syllogism, such as *tanāquḍ* (contradiction) and *'aks* (conversion). If

there is found any similarity, it must not be confused with the technical terms of logicians.

The closest logical figures of syllogism to the method of *ijtihād* are *qiyās iqtirānī* (syllogism by coupling or combining two propositions) or *istithnā'ī* (syllogism by exclusion).[71]   Shāṭibī quotes the Mālikī jurist Abū'l Walīd al-Bājī (d. 1081) who rejected logicians' claims that there cannot be a conclusion without two premises, and, referring to *fiqh*, argued that it is possible to conclude from one premise only.[72]

It is in the light of this explanation that Shāṭibī rejects the requirement of a knowledge of the rules of logic for *shar'ī* purpose,[73]   whereas knowledge of the Arabic language and that of the objectives of law is considered *sine qua non*. As for other sciences such as the science of the readings of the Qur'ān, or that of *ḥadīth*, or *kalām*, they are not considered absolutely necessary. In fact, a *mujtahid* can justifiably accept the conclusions reached by these sciences as *muqaddimāt* (premises, foundations) in *ijtihād*.[74]

The above analysis of *ijtihād* shows that Shāṭibī saw it as a process of adapting the legal system to social changes. What distinguishes his treatment of *ijtihād* is his outlook as a jurist. He looks upon *ijtihād* as a necessary process but neither open to everyone nor at all times. It is exercised only when it is needed. *Taqlīd* for him is not a theological concept, but a practical necessity in a legal system.

From the above study of Shāṭibī's concepts of *'āda, bid'a* and *ijtihād* it may be safely concluded that there are elements of continuity and change in Islamic legal theory provided by these concepts. For a general conclusion of our study we better proceed to next chapter which summarises the entire discussions of this study and draws conclusions thereof.

NOTES

1. *Al-Muwāfaqāt*, Vol. II, 281.
2. *Ibid.*, 279ff.
3. *Ibid.*
4. Shāṭibī uses both *'ādāt* and *'awā'id* as plurals of *'āda*. Etymologically, some linguists claim that *'awā'id* is the plural of *'ā'id* and *'ā'ida* (something that re-occurs), and *'ādāt* is plural of *'āda*. This distinction is, however, generally disregarded. In Shāṭibī's use of *'awā'id* there is some indication that he uses *'ādāt* for those legal acts which are opposite to *'ibādāt*, and *'awā'id* for habits, customs, etc. But this distinction is not consistently maintained by him.
5. *Ibid.*, Vol. II, 280.
6. *Ibid.*, Vol. II, 297. The examples of eating, drinking, etc., are given to illustrate *'āda*.
7. *Ibid.*, Shāṭibī gives the examples of variety of *'āda* in different forms of dwellings; on p. 307, he gives the examples of customs in pre-Islamic period to illustrate *'āda*.
8. *Ibid.*, pp. 307-308.
9. *Ibid.*, Vol. III, 121f. Ses also above p. 203f.
10. *Ibid.*, Vol. II, 281-82.
11. *Ibid.*, Vol. II, 283ff.
12. *Ibid.*, Vol. III, 265.
13. *Ibid.*, Vol. II, 307.
14. *Ibid.*
15. *Ibid.*, Vol. I, 174.
16. *Ibid.*, Vol. II, 297-98.
17. *Ibid.*, 284-85.
18. *Ibid.*, 283-84.
19. *Ibid.*, 284.
20. *Ibid.*
21. *Ibid.*, Vol. I, 173.
22. *Ibid.*, II, 409-410.
23. *Ibid.*, Vol. I, 161.
24. *Al-I'tiṣām*, Vol. II, 293ff.
25. *Ibid.*, Vol. I, 26-111.
26. *Ibid.*, 82.
27. *Ibid.*, 18f.
28. *Ibid.*, 18.
29. *Ibid.*, 19.
30. *Ibid.*
31. *Ibid.*
32. *Al-Muwāfaqāt*, II, 337ff.
33. *Ibid.*, pp. 341-42.

34. Shāṭibī, here, refers to Mālik whose reliance on *maṣāliḥ mursala* is strongly criticised by other jurists. Shāṭibī defends Mālik in the following manner

    Mālik, adhering to the principle of not applying rational explanations in matters of *'ibādāt* "revolves entirely around his [approach to] stop at the limits prescribed by *Sharī'a*, [and thus] disregarding what *munāsib* requires...[This is] in contradiction to *'ādāt* which are governed according to suitable reason (*al-ma'nā al-munāsib*) which is evident to human reason (*'uqūl*). He employed laxity (*istirsāl*) with self-confidence and with deep insight in reasoning by *maṣlaḥa* ...[He employed this laxity so frequently] that the scholars often condemn him because of this laxity. They imagined that Mālik threw off the yoke [of Sharī'a] and opened the gate of law-making. How far is it [from truth]!" *Al-I'tiṣām*, p. 113.

35. *Ibid.*, p. 115.
36. *Ibid.*, p. 96.
37. *Ibid.*, p. 98.
38. *Ibid.*, pp. 99-110.
39. *Ibid.*, p. 111.
40. *Ibid.*, For instance, Shāṭibī explains, Shāri''s prescriptions about cleanliness from human excretions are not rationally uniform. In case of urine and stools one is obliged only to wash certain parts of one's body, (i.e. ablution), but in case of nocturnal discharge, washing of the whole body is obligatory.
41. *Ibid.*, p. III. pp. 113-115.
42. *Al-I'tiṣām*, Vol. II, 24.
43. *Ibid.*, Vol. I, 22. "Fa kullu mā 'ukhturi'a fī'l-dīni mimmā yuḍāhī al-mashrū' wa lam yuqṣad bihī al-ta'abbud, fa qad kharaja 'an hādhihī al-tasmiyya".
44. *Ibid.*, pp. 22-23.
45. *Ibid.*, 147ff.
46. *Ibid.*, 232ff.
47. *Ibid.*, Vol. II, 63-67.
48. *Ibid.*, 67.
49. *Ibid.*, 68.
50. *Al-Muwāfaqāt*, vol. IV, p. 89.
51. *Ibid.*, p. 90.
52. *Ibid.*, p. 97.
53. *Ibid.*, p. 90.
54. *Ibid.*, p. 91.
55. *Ibid.*, p. 92.
56. *Ibid.*, p. 105.
57. *Ibid.*, p. 93.
58. *Ibid.*, pp. 97-98.
59. *Ibid.*, p. 95.
60. *Ibid.*, p. 96.
61. *Ibid.*, p. 162f.
62. *Ibid.*, p. 96.
63. *Ibid.*, p. 89.
64. *Ibid.*, p. 105.

65. *Ibid.*, pp. 118ff.
66. *Ibid.*, p. 128.
67. *Ibid.*, pp. 162-165.
68. *Ibid.*, pp. 105-6, 162f.
69. *Ibid.*, p. 165f.
70. *Ibid.*, p. 334.
71. *Ibid.*, p. 337.
72. *Ibid.*, p. 339.
73. *Ibid.*
74. *Ibid.*, pp. 110-111.

SUMMARY AND CONCLUSIONS

Granadian society in the fourteenth century underwent certain very significant changes. These changes were both multidimensional and fundamental for the Granadian legal system; they affected the oplitical, religious, economic and legal structure of the society.

Sulṭān Muḥammad V al-Ghanī Billāh's reign (1354-59, 1362-91) was replete with depositions, intrigues, and assassinations. He eventually brought political stability to the kingdom by making himself an absolutely independent ruler. The Sulṭān secured his independence by weakening the political power of the offices of *Shaykh al-Ghuzāt, Wazīr* and *Qāḍī al-Jamā'a.*

The weakening of the office of the Qāḍī al-Jamā'a affected the political power of the *fuqahā'* in general. The *fuqahā'* as a political and social group were very powerful. They held most of the administrative offices, and, further, they were the principal authority in religious matters and they controlled the institutions of learning. In addition, they were responsible for the administration of a considerably large amount of trust property.

The decline of the political power of the *fuqahā'* began with the Sulṭān's skillful manoeuvres to become independent of the *fuqahā'*. There were a number of factors which facilitated the Sulṭān's success. One of these was the introduction of the state-controlled *madrasa* system of learning in the days of the Sulṭān's father. Despite the opposition of the *fuqahā'* the *madrasa* system had succeeded and had been gradually making the fuqahā' dependent on the Sulṭān.

The second factor was the penetration of *taṣawwuf* and *ṣūfī ṭarīqas* into Granadian society. The Sulṭān had bestowed his favours on the *ṣūfī shaykhs* because the Berber mercenaries who constituted the armies of the Sulṭān were followers of the *ṣūfī shaykhs*. To weaken the power of the *shaykh al-ghuzāt* and of the *fuqahā'* and to raise his prestige among these mercenaries the Sulṭān would eagerly patronize *taṣawwuf*. Furthermore, the *ṣūfī* life, being simple and pious, appealed to the people at large, who compared *ṣūfī* life with that of the *fuqahā'* who lived in an aristocratic style. The rise of the *ṭarīqas* which undermined the religious and legal authority of the *sharī'a* was a real threat to the *fuqahā'*.

The above political and religious changes were further solidified by other factors which brought certain fundamental changes in the economy of Granadian society. Due to continuing loss of territories to Christians, agricultural land in Granada had become scarce. Furthermore, the Muslim emigrants from Christian Spain, and the Berber fortune-seekers from Africa were adding to the already over-grown population. Consequently every possible piece of land was being used for agricultural purposes. Thus, new forms of agrarian property, new types of agrarian partnership and the practice of hired seasonal labour had become popular.

To add to the complexity of the economy, the Granadian treasury owed to Christians and to the Berbers huge sums of money which were to be paid in cash. Hence state revenues had to be collected in cash. In addition, a number of new taxes were introduced. Since this economic situation affected the gold and silver reserves in the treasury, a copper dīnār was introduced, probably as a devalued currency.

Local crafts and industries supplemented agricultural production, but by this time they had naturally become of prime importance. In the Kingdom of Granada, silk was the most profitable export industry. The Italian silk industry had, however, reduced the demand for finished Granadian products in the Mediterranean market. Now, raw silk was more in demand. Hence the Granadian economy was geared to such demands.

The Mediterranean trade had also developed rapidly. To meet the demands of Italian manufacturers, raw materials were imported from Africa and Spain. Granada, being connected with Malaga and Almeria, was situated on one of the very significant arteries of trade that linked North Africa with the European countries. The significance of trade was

recognized by the rulers in these countries. Strong trade pacts among these principlaities assured the safe transit of merchandise.

The affects of the above-mentioned developments were very far reaching for the legal system in Granada. New commodities and ideas were being exchanged. New forms of transactions had emerged. The legal theory had to accommodate all these changes into the system. The existing legal system was not adequate for the new circumstances. The incompetence of the legal system was recognized by Ibn al-Khaṭīb in his criticism of notaries and their outdated legal practice in regard to legal contracts. The internal contradictions of the system were exposed under the impact of these changes. An indication of these contradictions is seen in tne controversy over the demarcation of the functions of the *muftī* and the *qāḍi*.

Such was the milieu in which Shāṭibī (d. 1388) grew up in Granada. His training in *fiqh* brought him into touch with these problems quite early in his career. Later, he actively participated in discussions and disputations with other scholars on the problems arising out of the social conditions mentioned above. Quite early on he realized the inadequacy of the legal system in Granada. The centre of his interests were the problems relating to Islamic legal theory and particularly the devices that the Mālikī *fuqahā'* had used to adapt Mālikī legal theory to accommodate social changes. One such device was that of *murā'āt al-khilāf*. By accepting diversity of laws as fact, the Mālikī *fuqahā'* came into possession of a legal device to accommodate new social practices. For Shāṭibī, accepting diversity of laws meant negating the very basis of law. On various aspects of this and other problems, he wrote to Mālikī scholars in Andalus and in Africa. After a long search and investigation, he expounded his doctrine of *maqāṣid al-sharī'a*. He examined the traditional legal theory in the light of this doctrine. The result was his book *al-Muwāfaqāt* in four volumes.

As Shāṭibī had expected, *al-Muwāfaqāt* was not welcomed. He was called a heretic. Alluding to a number of Shāṭibī's actions in his public life, his opponents condemned him as an innovator. He defended himself against these charges by writing his other book *al-I'tiṣām* in which he defined the concept of *bid'a*.

In preparing his *fatāwā*, Shāṭibī had further actual experience of the inadequacy of the then legal theory to meet the challenge of

We have seen above that out of 40 queries that we have examined, 34 were related to social changes. Shāṭibī found that the methods of analogy and of borrowing from other schools of law in the name of *murā'āt al-khilāf* was not sufficient.

The insufficiency of the provisions of Islamic law and the methods of Islamic legal theory to cope with rising needs were more conspicuous in the area of contracts and obligations. Growing economic activities, especially in trade and commerce, demanded freedom of contract. The Mālikī *fuqahā'* found it difficult to respond to such demands. The new forms of contract had become highly complicated. The older framework of contract in Mālikī legal theory, which still operated on the legal fiction of *shirka fi'l-zar'* derived from the early Medinese practice of agrarian partnership, did not provide sufficient analogies to new kinds of contract which were different both in form and in nature. The Mālikī *fuqahā'* tried to solve these problems by adhering to the method of analogy through various devices, but the search for particular precedents to particular cases proved unsuccessful. A number of *fuqahā'* were forced to fall back on the original Mālikī general legal principle of *maṣlaḥa*.

Shāṭibī also had the same experience in preparing his *fatāwā*. He too had to refer to principles such as *tashīl, maṣlaḥa* and *'adam ḥaraj*. He, however, realized that he could not apply these principles indiscriminately to all areas of social and legal change. Under the influence of *taṣawwuf*, a number of new rituals had come into social practice. He regarded these rituals as *bid'a* and rejected them. The need for such distinctions impressed upon him the significance of investigating the aim and purpose of law, the nature of legal obligation, and the method of legal reasoning.

Shāṭibī found the principle of *maṣlaḥa* to be the essential point at which all the enquiries about the nature and purpose of legal obligation, social and legal change, and the method of legal reasoning converge. At the same time this principle also provides the basis of the unity that underlies the diversity of rules in Islamic law.

The principle of *maṣlaḥa*, as a legal concept, however, has not been a simple concept in *uṣūl al-fiqh*. Various theological, moral, methodological and more recently ṣūfī conceptions of *maṣlaḥa* had posed serious difficulties for the use of *maṣlaḥa* as a principle of adaptability. The

Ash'arī denial of causality in God's actions made it impossible to analyse *shar'ī* commands on the basis of an *'illa*.

The ṣūfīs denied anything that implied any pleasure for the lower soul. Their emphasis on *wara', zuhd* and *ikhlāṣ* rendered *maṣlaḥa* simply into an indulgence in personal desires.

Methodologically, according to traditonal jurists, *maṣlaḥa* provided only a probable basis of reasoning if it was not supported by a specific legal Text. Traditionally *maṣlaḥa* was classified from two perspectives. From one viewpoint it was divided into *ḍarūrī, ḥajī* and *taḥsīnī* with the last two being rejected. From the other angle *maṣlaḥa* was divided into *mu'tabara, mulghā'* and *mursala;* as the first two were in fact covered by the legal Text, it was only *maṣlaḥa mursala* which remained to be discussed. Consequently the discussion of *maṣlaḥa* was reduced to a consideration of *maṣlaḥa mursala*. It is evident that Shāṭibī's analysis of *maṣlaḥa* keeps the traditional criticism of *maṣlaḥa* in view. The first thing that emerges from his analysis of this concept is his stress on human needs rather than on its being simply a Divine prerogative in the absolute sense. From Shāṭibī's definition of *maṣlaḥa* and its characteristics and from his discussion of its five aspects, it becomes clear that the essential element in the concept of *maṣlaḥa* is consideration for and protection of the necessities of human life in this world and in the hereafter.

Shāṭibī accepts the traditional division of *maṣlaḥa* but rejects the limitations on their validity. He finds *ḥajī* and *taḥsīnī* types of *maṣlaḥa* to be complementary and to act as protective zones for the *ḍarūrī* type. The two are indispensible in this sense. He does not seem to accept the other division, however,. The term *maṣlaḥa mursala* is seldom used in his discussion of *maṣlaḥa*, and when it is used, it does not differ in meaning from *maṣlaḥa*.

In his analyiss of the concept of *maṣlaḥa*, Shāṭibī established certain distinctions to clarify the confusions that had gathered around this concept. He analyzed the implications of *ta'abbud, ḥuẓūẓ,* and *mashaqqa* in order to elucidate the concept of legal obligation. He refuted the ṣūfī conclusion that abandoning of the *ḥuẓūẓ* was an essential meaning of *ta'abbud*. He explained that *ta'abbud* has two senses; one to obey without searching for the reasons underlying obligations and the other to conform

to the intent of the Law-giver. Shāṭibī concluded that the first sense of *ta'abbud* is applicable only to the *'ibādāt* which he distinguished from *'ādāt*. The other sense was applicable to the entire body of legal obligations. Obeying the intent of the law-giver meant to regard the *maṣlaḥa* or *ma'ānī* in *'ādāt*. *Ta'abbud* in the second sense means to obey the explicit meaning in *'ibādāt*. He further explained that *ta'abbud* in the technical legal framework means that the area of *'ibādāt* cannot be extended further than what has been revealed by the Law-giver.

Shāṭibī answers the theological objections to *maṣlaḥa* by pointing to the confusion that had resulted from not distinguishing between two levels of the Divine Will. Divine Will at the legislative level does not operate in the same way as it does at the level of the Creation. The legislative will allows man's freedom to act and holds him responsible for his acts. Human freedom and responsibility logically require that the Divine Commands must be within man's capability to comply with them and, further, that they must be intelligible. Intelligibility refers to both the linguistic and the rational aspects of the commands. Thus the factors of responsibility, intelligibility and rationality taken together, necessitate that Divine Commands should be based on an explicit or implicit *'illa*, so that they can be understood, generalized and extended to like situations. Ash'arī jurists, in order to defend God's Omnipotence. were forced not only to deny the *'illa* in Divine Commands, but were also compelled to say that a Divine Command does not necessitate the Divine Will. Shāṭibī differentiated between two Wills; the Creative Will which is to desire someone to produce a certain act. Thus, contrary to Ash'arīs, Shāṭibī was able to make it clear that a Divine Command with a legislative will does not necessitate its actualization, yet it stresses the support of the Command by the Divine Will.

The basic components of Shāṭibī's concept of *maṣlaḥa* are, thus, the following: (1) consideration for the needs of man, (2) the rationality of legal commands and the responsibility of man, (3) protection from harm, and (4) conformity with the objectives of the Law-giver.

Shāṭibī, however, distinguishes *maṣlaḥa shar'iyya* from the ordinary concept of *maṣlaḥa*; the former is abstract and simple. Ordinary *maṣlaḥa* does not exist in pure and simple form; it always contains certain elements of *mafsada*. Ordinary *maṣlaḥa* is known by weighing the aspects of good and evil in an action; whichever dominates characterizes the thing

in question. *Maṣlaḥa shar'iyya* as a legal obligation takes into account only the dominating aspect which is pure and simple, unmixed with *mafsada*.

In Shāṭibī's understanding *'āda* and *sharī'a* are very closely connected. Although both are willed by God, yet the former belongs to the Creative Will and the latter to the Legislative. Except for certain fundamental laws *'āda* may undergo changes, whereas *sharī'a* insofar as it reflects the Divine will cannot change. To find rules for new situations occurring because of changes in *'āda* one needs to know the exact rule or the intent of the law. This intent can be known through studying *'āda* in combination with the principles inductively derived from *sharī'a*.

The above-described concept of *maṣlaḥa* was admirably suited to Shāṭibī's understanding of social changes and to his views on legal change. According to Shāṭibī the *'awā'id* or the habits of individuals and social practice alike are stabilized by certain universal laws which do not change. The changes that occur in society happen because of the movements of individuals from one place to another, or because of the movements of social customs along with the migration of people. More fundamentally, changes are generally produced by human needs. It is when these social changes go beyond the provisions of the rules of law or when they become too complicated for the existing rules, that a *muftī* or *mujtahid* is summoned, through the agency of a *fatwā*, to examine the law and legal theory as they relate to the changes in question.

The process of legal change may be called *ijtihād*, Shāṭibī divides *ijtihād* into four types. Although the 'gate' of *ijtihād* is closed in none of the types, yet Shāṭibī was of the opinion that because of cumulative growth of *fatāwā* and judicial decisions, *ijtihād* may not be needed in many areas. For Shāṭibī *ijtihād* and *taqlīd* are legal necessities and not theological obligations. Thus Shāṭibī comes to a new conclusion about the principle of *ijtihād*. As has been pointed out, this rather legalistic and postive understanding of *ijtihād* is quite significant for Shāṭibī's legal philosophy.

Having summarized our findings, we may now draw conclusions in reference to the problem of the adaptability of Islamic legal theory to meet social changes.

We have seen that Shāṭibī admits that changes take place in society and that the legal changes in the area of *'ādāt* accord with social needs. We have also found Shāṭibī to believe that although its general and uni-

versal principles remain unchanged, yet Islamic law does accommodate itself to changes and that it favours the consideration of social needs in making its accommodations. According to Shāṭibī, *ijtihād* provides a method and process for legal change; *maṣlaḥa* gives a basis and direction to change; and the concepts of *bid'a* and *ta'abbud* provide limits to social and legal changes.

Through his analysis of *maṣlaḥa* as the purpose of Islamic law, Shāṭibī has tried to free the operation of Islamic legal theory from a number of factors of determinism and rigidity arising out of theological and methodological considerations. In fact his concept of *maṣlaḥa* provides a correction for many traditional as well as modern misunderstandings of this concept. We need not repeat all the points relevant to these correcttions; it will suffice to say that contrary to the general understanding, *maṣlaḥa* is neither a totally relative and arbitrary principle nor is it strictly tied to *qiyās* or to specific legal texts of *sharī'a*. It is connected with social needs at one end, and on the other it is inductively supported by *sharī'a*. It is, thus, not a special form of analogy, nor is it an extra legal method of expediency to provide an area of flexibility in legal reasoning along with more strict elements of the law. To Shāṭibī, *maṣlaḥa* is an integral principle that unifies *sharī'a*, provides stability and gives direction to legal changes.

It can be seen that Shāṭibī had considerably improved upon the traditional philosophy of Islamic law by refining and clarifying certain basic legal-philosophic concepts, particularly the concept of *maṣlaḥa*. His views were quite fitting for the needs of Islamic legal theory in fourteenth century Granada. As we have seen, quite similar developments in the philosophy of law took place in Christian Spain that came to bear fruit in the sixteenth century in Suarez's philosophy of law. The difference was, however, that in Christian Spain those activities which continued through the sixteenth century later helped in the development of modern philosophies of law. In Muslim Spain, despite the fact that Shāṭibī's philosophy of law was in some respects similar to that of Suarez, it did not gain acceptance, and the traditional view persisted. Why did Shāṭibī's philosophy fail?

To explain the failure of Shāṭibī's legal philosophy on the basis of material and historical reasons will not be sufficient. His legal philosophy was revived in the Salafiyya and Liberal movements in the nineteenth

century, and as various studies such as those by A. Hourani and M.H. Kerr have shown, it once again failed although the historical setting and and circumstances were this time more favourable.

The reasons for this failure must also be sought within Shāṭibī's philosophy and in the understanding of it by his recent followers. Since the matter lies beyond the scope of this study we will only suggest in respect of it that Shāṭibī's recent followres do not seem to have accepted his philosophy as a whole. For instance, they refer to *maṣlaḥa* as a principle of expediency to be used in cases where the provisions of legal texts and the method of analogy do not suffice. This is not Shāṭibī's understanding of *maṣlaḥa* but is rather a repetition of concepts long held in the community. Thus, in fact, these recent followers have not departed from the traditional concept of *maṣlaḥa*.

One would have expected that in view of modern developments in theories and systems of law, Shāṭibī's philosophy would have been further refined by his modern disciples. Instead, they have remained within the tarditional framework of legal methodology and have even interpreted Shāṭibī's philosophy in the same framework. Consequently, it was possible for scholars such as Rashīd Riḍā to blunt the thrust of Shāṭibī's philosophy by giving Shāṭibī the image of a conservative, a crusader against innovation and of a reviver of tradition.

From our studies above it is possible to suggest that there is a significantly visible trend in Shāṭibī's legal thought towards a positive Isalmic law. His emphasis on *maṣlaḥa* and his attempt to free legal theory from theological determinism indicate such inclinations. To illustrate, we may refer to his demarcation of two areas of legal change.

He stresses that no innovation can be accepted in *'ibādāt,* whereas in *'ādāt* changes are possible. The element of positivism lies in his theoretical justification of the above conclusion. He explains that *'ibādāt* belong to that area of *maṣāliḥ* which is known only to God. Generally *'ibādāt* cannot be rationally explained. Since they cannot be observed and tested by human reason, they cannot be extended by analogy to similar situations.

The area of *'ādāt* is different, however. Not only are *'ādāt* based on *maṣāliḥ,* but the commands in *sharī'a* relating to *'ādāt* usually provide

the reason indicating that these *maṣāliḥ* can be grasped by human reason. Further, *'ādāt* are observable and they can be tested. This is the reason why they are extendible by analogy, and why they can be the subject of *ijtihād*.

Such arguments should have led Shāṭibī to positivism in his legal philosophy, yet there are no explicit statements by Shāṭibī showing such a tendency.

The reason why Shāṭibī's legal philosophy did not succeed in moving in this direction perhaps lies in the fact that though he maintained a distinction between *'ādāt* and *'ibādāt,* yet he found it difficult to define these terms in reference to their scope and contents. He seems to have developed two criteria to distinguish *'ibādāt* from *'ādāt;* one that the *maṣāliḥ* of *'ibādāt* are known only to God and second that *'ibādāt* belong to the realm of *ta'abbud.* These criteria, however, are liable to confusion. In many obligations, which are generally known as *'ibādāt,* the Qur'ān explicitly mentions their *maṣāliḥ* and *'illa.* For instance piety as the *maṣlaḥa* for fasting. Secondly, as pointed out below, Shāṭibī himself prescribes *ta'abbud* in *'ādāt.*

The weakness lies, however, in the development of his argument, not in his thesis on the distinction of *'ādāt* from *'ibādāt.* In his system of thought it may be added that the *maṣāliḥ* of the *'ādāt* are known to the society on the basis of social knowledge, but the *maṣāliḥ* of *'ibādāt* cannot be known by social experience and hence cannot be prescribed, discontinued, changed or extended by the society. Here lies, in the distinction of *'ādāt* from *'ibādāt* on these basis, the element of 'positivism'.

The implicit 'positivism' in Shāṭibī's legal philosophy may be further noted in his attempt to separate law (*fiqh*) from theology and from *ṣūfī* morality as set out in his definitions of legal obligation. Although he believed the origin of Islamic law to lie in religion and morality, yet his concept of obligation could lead to maintain that theological and moral conception of obligation and its definition in these terms could not be admitted into the definition of legal obligation. He was, however, reluctant to reject entirely the theological and moral implications of legal obligation.

This reluctance, in fact, sometimes resulted in his allowing an element of confusion to creep into his definitions. For instance, we may cite his definition of *ta'abbud.* His illustrations of *'ibādāt* refer to the well-known Islamic rituals and other such acts which, according to him, should

be accepted without rational explanation in contrast to *'ādāt* which have rational bases. There are a number of occasions, however, when he implies that even those legal commands in the Qur'ān, which do not concern *'ibādāt* such as those governing family relations, should also be accepted without rational explanation. Does he mean that he extends the definition of *ta'abbud* in the sense of *'ibādāt* to all the commands in the Qur'ān?

In the light of Shāṭibī's philosophy as a whole, it is difficult to explain such departures. Most probably these departures result from Shāṭibī's reluctance to accept the logical conclusions of his doctrines which could have led him to separate the two levels of conceiving the legal obligation i.e. the level of the origin of legal obligation and the level of its definition and application. The first level may relate to religion and morality, but such a relationship is not necessary on the second level. One can appreciate Shāṭibī's reluctance if it is recalled that the legal system in his day, despite certain attempts, did not succeed in separating the jurisdiction of the *muftī* from that of the *qāḍī.* Particularly when the *muftī* was also regarded as a deputy of the Prophet, and as such his jurisdiction included both religious and legal matters and the bases of his authority were somewhat metaphysical; the *muftī* derived his authority from the metaphysical principle of continuation of Divine guidance through prophets, and after Muḥammad through *muftīs.*

The *qāḍī* did not enjoy independence in the legal system; he had to rely on the *muftī,* who was attached to the court as a consultant, for the validity and legality of his decisions. Such limitations on the institution of the qāḍī inevitably influenced the concept of legal obligation.

Inspite of his attempts to define legal obligation, Shāṭibī did not uphold the independence of the *qāḍī* from the *muftī.* Hence his legal philosophy, despite certain elements of positivism, did not go far enough and, consequently, could not grow into a positive legal philosophy. This is probably the reason why this philosophy has also failed more recently when modernists have attempted to use it without supplying the necessary correctives.

It may, in fine, be concluded that, in the history of *uṣūl al-fiqh,* Shāṭibī's philosophy of law marks a tendency towards "legal positivism" A proper understanding of its limitations, which had resulted from the

particular historical nature of Islamic law in this period, and of the ambiguities resulting from these limitations, may help us to reconstruct Shāṭibī's arguments to adapt Islamic law to social change. Such a reconstruction might hold a key to a fruitful adaptation of Islamic law to modern circumstances.

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GLOSSARY

abadī : Continuous, eternal.

'abd : Slave, servant, man.

'āda : Habit, practice of the people, custom, mores.

'ādāt : (Pl. of *'āda*.)

"Those obligations which aim at the protection of human life, intellectual faculty and other things in this world". (Shāṭibī)

'adl : Just, justice, balance.

aghrāḍ : (Pl. of *gharaḍ*).

aḥbās : (Pl. of *ḥabs*).

al-aḥkām al-taklīfiyya : Legal values resulting directly from Commands which impose obligation.

ahwā al-nufūs : See *hawā*

aḥwāl : (Pl. of *ḥāl*).

ākhira : Hereafter.

alam : Pain.

'amal : Act, action, juridical practice.

amāra : Sign.

amr : Command.

'aql : Human reason, intellectual faculty.

arbāb al-aḥwāl : The people of mystic states, Ṣūfīs.

aṣl : Root, root to which analogy is sought, first principles, textual basis.

asrār : (Pl. of *sirr*) Rational explanation.

awāmir : (Pl. of *amr*).

'azīma : Regularity, not opting for allowance permitted by the Lawgiver in performing an obligation.

bid'a : Innovation, innovation in *'ibādāt*.

bid'a ḥaqīqiyya : Absolute innovation.

bid'a iḍāfiyya : Relative innovation.

bughḍ : Undesirability.

dalāla : Indication, signification.

dalāla aṣliyya : Essential signification.

dalāla tābi'a : Subordinate denotation.

dalīl : Evidence, proof.

ḍarūra : Necessity.

ḍarūrī : Necessary, a priori, a grade of *maṣlaḥa*: "Indispensible in sustaining the good (*maṣāliḥ*)." (Shāṭibī).

dawām : Perseverence.

dawr : Arguing in circle.

dhawq : Taste; mystic taste.

dunyā : This world. Mundane matters.

far' : Branch, particular for which an analogy is sought.

faraḥ : Happiness.

fasād al-zamān : Corruption of contemporary conditions.

fatwā : Legal opinion.

ghalbat al-ẓann : Predominant probability.

gharaḍ : Motive, individual interest.

ḥabs : Trust property, *waqf*.

ḥāja : General need.

ḥājī : "Those *maṣāliḥ* which are needed in order to extend the purpose of *maqāṣid* and to remove the strictness of the literal sense the application of which leads mostly to impediments and hardships and eventually to the disruption of *maqāṣid*." (Shāṭibī).

ḥakam : Arbitrator.

ḥākim : One who issues commands, one who gives judgment.

ḥāl : Mystic state.

ḥaqīqa : Essence, truth, fact.

ḥaraj : Impediment.

hawā : Passion, desire.

hawā al-nafs : Personal liking.

ḥikma : Wisdom, reason.

ḥīla : Legal evasion.

ḥimā : Fence, protective zone.

ḥiyal : (Plural of *ḥīla*).

ḥubb : Desirability.

ḥudūd Allāh : Limits of God, penal laws.

ḥukm : Value, practice.

ḥuqūq : Rights, duties.

ḥuẓūẓ al-nafs : Self-consideration; self interests; pleasures of soul.

'ibādāt (Pl. of *'ibāda*) : Obligations, rituals, worship. "That which aims at the protection of religion (dīn)." (Shāṭibī).

ibāḥa : Permission.

ibtidā' : To introduce new things into religious matters, *bid'a*.

iḍtirār : Compulsion.

iḍṭirārī : (Obligation) imposed upon man without his choice.

ifhām : Intelligibility.

iḥdāth : Innovation.

ijbār : Determinism.

ijmā' : Consensus.

ijtihād : Independant legal reasoning.

al-ijtihād al-maṣlaḥī : Legal reasoning on the basis of *maṣlaḥa*.

al-ijtihād al-qiyāsī : Legal reasoning by analogy.

ikhbār : Statement.

ikhlāṣ : Sincerity, purification.

ikhtiyārī : By man's own choice.

'illa : Motive, reason, cause.

ilzām : Binding.

īmā' : Implicit indication.

imtithāl : Compliance.

inshā' : To institute.

iqtidā' : Following, authority.

iqtiḍā' : Demand.

irāda : Intention, will.

ishāra : Textual indication.

istidlāl : Reasoning.

istiftā : Asking for a fatwā.

istiḥsān : To decide in favour of something which is considered good by the jurist, over against the conclusion that may have been reached by analogy.

iṣṭilāḥ : Technical sense/term.

Istiṣlāḥ : To decide in favour of something because it is considered good (*maṣlaḥa*), and more beneficial than any thing decided otherwise.—A method of interpreting already existing rules, by disengaging the spirit of these rules from the letter: exceptions and extensions are reached which command practical Utility and correspond to the fundamental goals of the law.

istimrār : Continuity.

istinbāṭ : Inference.

istiqrā' : Introduction.

istiqrār : Persistence.

jināyāt . Penalties, tort. "That which aim at the protection of the five *maṣāliḥ* in a preventive manner'. (Shāṭibī).

al-jawāz al-'aqlī : Logical possibility.

jazā' : Reward.

al-jihat al-ghāliba : Predominant side.

kaffāra : Penalty, expiation.

kashf : Mystic revelation.

kawn : Being; the world of existence.

khalq : Creation, Created world.

kharq al-'āda : Deviation from regular habit or custom.

khāṣṣ : Particular.

khilāf : Disagreement.

khitāb : Promulgation, proclamation.

kulfa : Toil.

kullī : Universal.

kulliya : Totality, whole.

kulliyāt al-wujūd : Universals of being.

ladhdha : Pleasure.

maḍārr : Harmful.

maḍarra : Harm.

mafāsid : (Pl. of *mafsada*).

mafsada : Opposite of *maṣlaḥa*.

man' : Abstention.

ma'nā : Meaning, reason.

al-ma'nā al-ifrādī : Individual meaning.

al-ma'nā al-tarkībī : Contextual meaning.

manāfi' : (Personal) advantages.

manāṭ : Anchor, basis of a rule.

manfa'a : Benefit, utility.

māni' : Preventive cause.

mushaqqa : Hardship.

maqāmāt : Stations in the mystic journey.

maqāṣid : (Pl. of *maqṣid*).

maqdūr : Within one's capability.

maqṣid : Intention, goal, end, objective.

maṣāliḥ : (Pl. of *maṣlaḥa*).

maskūt 'anhu : Matters on which Lawgiver is silent; matters not covered in the Qur'ān.

maṣlaḥa : Human good, human interest, human welfare, public interest, utility, welfare.

"What concerns the subsistence of human life, the wholeness of his way of life, and the acquiring of what man's emotional and intellectual faculties require of him in its absolute sense." (Shāṭibī)

maṣlaḥa mursala : A *maṣlaḥa* not explicitly supported by the Text.

mu'āmalāt : Transactions. "Acts concerning those *maṣāliḥ* of men that relate with his fellow beings". (Shāṭibī).

muftī : Jurisconsult.

mujaddid : Religious reformer believed to appear at each turn of a century.

mukallaf : Subject of legal obligation; person obliged.

mukhtār : Free agent.

mulā'im : Suited.

munāsaba : Suitability; Suitability to the Texts, Affinity.

munḍabiṭa : Stipulative.

muqaddima : Pre-requisite.

muqārin : Associative.

murā'āt al-khilāf : Allowance for the disagreeing opinion.

musāqāt : Agrarian association.

mushāwir : Consultant, the *muftī* appointed to assist the *qāḍī*.

muʿtād : Customary, ordinary.

muṭlaq : Simple.

nahy : Prohibition.

naql : Transmission, tradition.

naskh : Abrogation.

naṣṣ : Text (*Qurʾān*, some times used for Texts of *Ḥadīth* and *fiqh* as well).

naẓar : Examination, reasoning.

niyāba : Proxy.

qaḍāʾ biʾl taʿaddī : Judicial decision by extension of the original ruling.

qaḍāyā ʿuqūl : Rational propositions.

qāḍī : Judge.

qaṣd : Intention.

qaṭʿī : Definite.

qimār : Speculation, gambling.

qiṣāṣ : Retaliation.

qiyās : Analogy.

al-qiyās al-naẓarī : Theoretical analogy.

qudra : Power, capability.

quwwa : Effectiveness.

raʾy : Personal discretion.

rifq : Leniency.

rukhṣa : Legal allowance. (c.f. *ʿazīma*).

sabab : Reason, cause, mediate cause.

sadd al-dharāʾiʿ : To block the ways possibly leading to undesired consequences.

shahwa : Lust.

sharʿ : Law.

sharṭ : Qualification.

shawār : Marriage gift, mahr.

ṣifa ḥukmiyya : Legal qualification.

siḥḥa : Soundness.

sirr : Inner self (Mystic term).

siyāsa : A decision based on public interest.

siyāsa sharʿiyya : Administration of justice according to Islamic law.

taʿabbud : Obedience, bondage to God.

 "Recourse to only what the Lawgiver has determined". (Shāṭibī).

 "Non-intelligibility of meaning". (Shāṭibī).

taʿāruḍ : Conflict.

tabdīl : Change (vertical), replacement of old *ʿāda* with a new one.

taghyīr : Change (horizontal), change and difference in *ʿādāt* in societies.

ṭahāra : Cleanliness.

taḥayyul : Seeking legal device to escape the severity of law.

taḥṣīl : Actualizing, obtaining.

taḥsīnī (Pl. *taḥsīnāt*): A grade of *maṣlaḥa*. "To adopt what conforms to the best of practice, to avoid such manners as are disliked by the wise people". (Shāṭibī).

aʾ-takālif al-ʿayniyya : Specific individual obligations.

al-takālif al-kifāʾiyya : Societal obligations.

takhfīf : Laxity.

takhrīj al-manāṭ : Deduction of the basis of a ruling.

takhṣīṣ : Particularization, restriction.

takhyīr : Option.

taklīf : Obligation.

taklīf mā lā yuṭāq : Impossible obligation.

takmīlī : Complementary.

taʿlīl : Determination of the cause of command by logical and linguistic analysis.

taḥqīq al-manāṭ : Verification of the basis of the ruling.

tanqīḥ al-manāṭ : Refinement of the basis of the ruling.

taqlīd : Adherence to one of the schools of law.

tarjīḥ : Preponderance.

tark al-ḥuẓūẓ : Forsaking the lawful rights.

tashdīd : Severity.

tashīl : Convenience.

tashrīʿ : Law making, legislation.

taʾwīl : Interpretation.

taʿyīn : Specification.

taʿzīr : Penalty.

ʿubūdiyya : Servitude.

ukhrawiyya : Belonging to the Hereafter.

ummī : Unlettered, not acquainted with Greek sciences.

ummiyya : Intelligibility to commonality. Ordinary-ness.

ʿuqūba : Punishment.

uṣūl al-fiqh : Islamic legal theory.

 "Induction of the Universals of evidences in such a manner that they become guide for the mujtahid". (Shāṭibī).

uṣūlī (pl. *uṣūliyyīn*) : Theorist of Islamic law.

waḍʿ : Instituting.

waḍʿī : Instituted, conventional, opposite of *ʿaqlī* (rational).

waḥy : Revelation.

warʿ : Piety.

wuththāq : Formularies, notaries.

ẓāhir : Apparent literal meaning.

ẓannī : Probable.

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